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REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING PART ONE OF THE FIRST INSTALMENT OF INDIVIDUAL CLAIMS FOR DAMAGES ABOVE US$100,000 (CATEGORY "D" CLAIMS)

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Introduction

1. This is the first report of the category "D" Panel of Commissioners (the "Panel") submitted to the Governing Council through the Executive Secretary of the United Nations Compensation Commission (the "Commission"), in accordance with Article 38(e) of the Provisional Rules for Claims Procedure (the "Rules"). 1/ The Panel was appointed by the Governing Council at its twenty-first session on 23 July 1996, upon nomination by the Secretary-General of the United Nations on the basis of the recommendations made by the Executive Secretary of the Commission. This is the first Panel constituted to consider claims in category "D", i.e. claims of individuals in excess of US$100,000 ("category 'D' claims"). Sixty-nine category "D" claims for an asserted value of US$55 million were submitted to the Panel (the "first instalment"). This report contains the determinations and recommendations of the Panel in respect of the first instalment of category "D" claims.

2. As is well known, on 2 August 1990, Iraq invaded and occupied Kuwait. The invasion and occupation was reversed by the forces of the Allied Coalition acting pursuant to United Nations Security Council resolution 678 (1990). Shortly after the cease-fire, by its resolution 687 (1991), the Security Council reaffirmed that Iraq is liable, under international law, for any direct loss, damage or injury to individuals, Governments and corporations as a result of Iraq's unlawful invasion and occupation of Kuwait.

3. The Governing Council of the Commission, by its decision 1 (S/AC.26/1991/1), adopted certain criteria for the processing of "the most urgent claims" which provided for "simple and expedited procedures" to enable payment to the many individuals who suffered personal losses as a result of the invasion and occupation of Kuwait. Those criteria were designed to facilitate prompt compensation in full to many claimants and interim relief to others while their larger or more complex claims were being processed. This group of urgent claims consists of categories "A", "B" and "C". Category "A" provided for fixed compensation in cases of departure from Iraq or Kuwait on the basis of simple documentation of the fact and date of departure. Category "B" similarly provided for fixed compensation in cases of personal injury and death of immediate family members on the basis of simple documentation evidencing the fact and the date of the injury or death. No documentation on the actual amount of loss was required for either of these two categories. Category "C" provided for compensation up to US$100,000 with respect to losses incurred by individuals in connection with departure, personal injury, death, personal property, bank accounts/securities, employment income, real property and businesses as a result of Iraq's unlawful invasion and occupation of Kuwait. The evidence required for such losses was specified as "the reasonable minimum that is appropriate under the particular circumstances and a lesser degree of documentary evidence for smaller claims, such as those below US$20,000". 2/ It was also provided that individual claims larger than US$100,000 might be submitted later in their entirety in

category "D" or the first US$100,000 might be submitted immediately in category "C" and the remainder in category "D".

4. The Governing Council, by its decision 7 (S/AC.26/1991/7/Rev.7) next established the criteria for category "D" claims, being individual claims in excess of US$100,000 "with respect to any direct loss, damage, or injury (including death) to individuals as a result of Iraq's unlawful invasion and occupation of Kuwait".

5. Paragraph 7 of decision 7 clarified that category "D" claims may be made by individuals for losses in excess of those compensable in categories "B" or "C", and by individuals who chose not to file claims in categories "A", "B" or "C" because their losses exceeded US$100,000, as well as for reimbursement of payments made or relief provided by individuals to others - for example, to employees or to others pursuant to contractual obligations - for losses covered by any of the criteria adopted by the Governing Council.

6. Decision 7 also specified an important guideline in paragraph 3, i.e. as far as possible, claims with significant common legal or factual issues should be processed together. This guideline was incorporated into article 38(a) of the Rules.

7. An important distinction was made by the Governing Council between the urgent claims in categories "A", "B" and "C", which generally are for lower amounts, and claims in categories "D", "E" (corporate claims) and "F" (claims of Governments and international organizations), by prescribing a higher evidentiary standard for such claims. The Governing Council specified in paragraph 8 of decision 7 that since claims in categories "D", "E" and "F" might be for substantial amounts, they must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss. This requirement was later incorporated into article 35(3) of the Rules.

8. The Panel notes that while several reports have been issued in respect of categories "A" (departure claims), "B" (serious personal injury or death claims) and "C" (claims by individuals up to US$100,000, hereinafter "category "C" claims"), this is one of the first reports to be issued in categories "D", "E" or "F". In view of the distinction made by the Governing Council between these two sets of categories, and as the factual situation at the time of the invasion and occupation has a significant bearing on the evidentiary standard required to be applied to category "D" claims, the Panel considered it most important to carefully review the available contemporaneous evidence of the invasion and occupation. Some of this evidence is briefly described in chapter II below.

I. CATEGORY "D" CLAIMS

9. The secretariat of the Commission estimates that a total of 10,570 category "D" claims for an asserted value of approximately US$10 billion have been filed with the Commission. 3/

A. Category "D" claim form

10. The "United Nations Compensation Commission Individual Claim Forms for Damages above $100,000" (the "'D' claim form") sets out the loss types in respect of which category "D" claims may be made. Such losses include: on page D1, departure costs, and mental pain and anguish resulting from being taken hostage, illegally detained or forced to hide; on page D2, damages arising from personal injury; on page D3, death claims; on page D4, personal property and motor vehicle losses; on page D5, loss of bank accounts and securities; on page D6, loss of income; on page D7, real property losses; on pages D8 and D9, business losses; on page D10, losses arising from relief payments; and on page DS.1, any losses not covered elsewhere on the "D" claim form.

11. Several of the loss pages described above provide that various types of claims may be made for mental pain and anguish ("MPA"). Specifically, MPA claims may be made for hostage taking, illegal detention or forced hiding on page D1; for damages arising from personal injury on page D2.1; for witnessing injury to a family member on page D2.2; for the death of a spouse, child or parent or witnessing the intentional infliction of events leading to death on page D3; and for the deprivation of all economic resources on page D6.

12. The Panel notes that page DS.2 of the "D" claim form, entitled "Summary of Losses Claimed", asks claimants to declare whether they have submitted another claim for the same loss or losses before another forum such as a domestic court. If any such claim is filed before another forum or if compensation is received for the same losses, the claimant is required to inform the Commission and "[a]ny amount so received will be deducted from any compensation awarded for your claim". The DS.2 page continues, under the sub-heading "declaration", as follows:

> "Your signature on the signature page of these claim forms constitutes an undertaking to inform the Commission whether you have submitted any claim for the same loss or losses before another forum or whether you have received any compensation for the same losses at any time before receiving compensation from the Commission".

13. The DSig page of the "D" claim form, entitled "Signature and Affirmation for Individual Damages Above US$100,000 Claim," requires the claimant to make the following affirmation under his/her signature: "I hereby affirm that the information in this claim is correct".

14. Furthermore, article 14(c) of the Rules requires each Government submitting a claim to provide an affirmation that "to the best of the information available to it, the claimants are its nationals or residents, and that it has no reason to believe that the information stated in the claims is incorrect." The Panel concurs with the view taken by the Panel of Commissioners reviewing claims in category "C" (the "category 'C' Panel") that a properly completed claim form itself constitutes an essential statement by the claimant. 4/ The "D" claim form contains detailed information about particular losses being claimed as well as the claimant's personal description of such losses. In view of this, and given the two affirmations referred to above, in the absence of anything to the contrary, the Panel considers that the "D" claim form can generally be regarded as a reliable starting point in the consideration of each category "D" claim.

B. The first instalment

15. With the exception noted below, the claims in the first instalment contain the following loss types only: D1 departure costs, D1(MPA), D3 death, D4 motor vehicles, D6 loss of income, D10 relief payments and D(Other). There is one claim in the first instalment for an asserted value of approximately US$30 million ("Claim 3000001"). Claim 3000001 has, in addition to a D4 motor vehicle component, a D4 personal property component (the majority of which consists of an Islamic art collection) and a D7 real property component.

16. The first instalment claims were submitted to the Panel by the secretariat pursuant to article 32 of the Rules. 5/ The claims in the first instalment were chosen to set precedents on a loss-type by loss-type basis (i.e., D1 departure costs, D1(MPA), D3 death, D4 motor vehicles, D6 loss of income, D10 relief payments and D(Other)). A smaller number of claims that were, generally, well presented and formed a manageable group were included by the secretariat in the first instalment in order to assist the Panel in setting criteria. During its work on the first instalment, the computerized database of category "D" claims was not yet available. Therefore it would not in any event have been feasible to process a larger first instalment due to the difficulties in grouping the claims and tracking Panel decisions. Further, where claims that met the foregoing selection criteria could be found in the first lots filed by countries or international organizations, they were included in the first instalment. The Panel agreed with the secretariat's view that, as far as possible, claims filed first ought to be processed first.

17. With the exception of the D4 and D7 loss types contained in Claim 3000001, three of the large loss types in category "D" (both in terms of number of claims and asserted value), namely D4 personal property, D7 real property and D8/9 business claims, were not included in the first instalment. Such large and more complex loss types require extensive expert assistance, for example in the form of loss adjusters and accountants, and are expected to be better processed in separate subsequent

instalments. Claim 3000001 was included in the first instalment to provide the Panel with an opportunity to consider how such large and complex claims are to be processed and also because it was one of the earliest claims filed.

18. The Panel is conscious of the fact that as the criteria developed in this report are based on relatively few claims, when larger numbers of claims are processed in future instalments, new issues may arise requiring appropriate amendment of the criteria that are being established in this report.

19. Upon a review of the claims in the first instalment, the Panel found that several claimants inadvertently claimed under the wrong loss type. Such claims were re-categorized under the appropriate loss type. In the case of seven claimants, it was found that the re-categorized loss type was not included in the first instalment. For example, one claim was filed for the loss of heavy vehicles under D4 motor vehicles and loss of income under D6. This claim in fact was found to be more appropriately categorized as a D8/9 business claim for the loss of business assets (the heavy vehicles) and loss of business income. Since D8/9 business claims are not being considered in the first instalment, upon the recommendation of the secretariat, the Panel refrained from deciding upon this claim and other re-categorized claims which will be included in the next appropriate instalment where the re-categorized loss type is included. Such deferral is without prejudice to the claims. A procedural order ("Procedural Order No. 2") was accordingly issued by the Panel on 2 September 1997 to inform the submitting entities concerned. In some cases, where the re-categorized loss type is included in the first instalment, the Panel has considered them under the loss type deemed appropriate.

20. As required by article 14 of the Rules, all the claims in the first instalment were reviewed by the secretariat and found to meet the formal requirements established by the Governing Council. Further, all claims in the first instalment have been reported in the reports of the Executive Secretary to the Governing Council made pursuant to article 16 of the Rules ("Article 16 Reports").

II. FACTUAL BACKGROUND TO THE INVASION AND OCCUPATION OF KUWAIT BY IRAQ

21. The enormous damage and dislocation caused in Kuwait during the invasion and occupation by Iraq is extensively documented in various United Nations documents and described in reports by Commissioner Panels in other claims categories (collectively the "Background Reports"). 6/ The Panel commenced its work by reviewing the Background Reports and found the factual information contained in them to be of critical importance in defining the criteria and evidentiary standards for category "D" claims.

22. The first report to the Secretary-General of the United Nations on humanitarian needs in Kuwait in the immediate post-crisis environment, was submitted on 28 March 1991 by Mr. Martti Ahtisaari, United Nations Under-

Secretary General for Administration and Management, immediately after the visit of his mission to Kuwait. This report observes:

> "Kuwait is scarred by the ravages of illegal occupation and, subsidiarily, of war. At least two thirds of the population present on 2 August 1990 are now scattered throughout the world. Those who remained have fresh memory of a brutal occupation and the sacking and pillaging of their homes, their resources and their environment. Many vividly recount inhuman or degrading treatment undergone by themselves or family members. I and my mission saw for ourselves prolific evidence of arson, looting, malicious destruction of homes, businesses, markets, museums, libraries and all that a nation cherishes. Kuwait's coast is disfigured by broken buildings and rolls of barbed wire; its beaches made lethal by hundreds of thousands of mines. Above it hangs a thick cloud of oily dark smoke that, on some days, brings a chilly twilight at noon, as well as still-uncharted perils to health. No one knows exactly how many of its oil wells are on fire; but at least half, perhaps 600 to 700, are belching flames and smoke. From the air, the horizon sometimes comprises only black clouds and pillars of fire, torched in a final deliberate onslaught by retreating troops. The environmental havoc still cannot be authoritatively assessed, but its consequences are already felt by neighbouring countries, and may affect yet others still more distant. Rivers, ponds and even lakes of spilling oil lie on the sand edge towards the wadis, the roads and the sea. Power stations, oil refineries, communications facilities and water-desalination plants have been destroyed by war or vandalized so that they are irreparable. Harbours are blocked, ships sunk, cranes toppled. Life-preserving medical equipment, even ambulances, have been removed; mainframe computers have been ripped out of Government offices and carried off. This scene of devastation, some being calculated, much wanton, was, I learned, even worse four weeks ago, when Kuwaitis began to return to their liberated country. For much has already been done, as the following paragraphs will show, to put Kuwait back on the road to reconstruction." 7/

In a concluding observation, the Ahtisaari Report states:

> "There can be no doubt that a deliberate attempt was made to extinguish Kuwait, its national identity, the pride of its people in their history and achievements. The manner of destruction, with its coordinated vandalism and massive looting, leaves an indelible image. It was a privilege for me and the members of my team to witness the rebirth of a nation, however painful the circumstances." 8/

23. Another Background Report, by a former United Nations Under-Secretary General, Mr. Abdulrahim A. Farah, dated 26 April 1991 9/, is in respect of

the scope and nature of damage to Kuwait's infrastructure. After a high level mission to Kuwait from 16 March to 4 April 1991, the Farah Report notes in detail the destruction inflicted upon Kuwait, particularly in respect of the oil sector, the environment, agriculture, transport and communications infrastructure, housing, social services, banking, commerce and manufacturing. The Farah Report notes that:

> "Today, Kuwait struggles to recover from the consequences of its occupation by Iraq, which have left no section of its population or sector of its economy untouched. Innocent lives have been lost and suffering caused to countless others. The damage inflicted on the economy almost seems incalculable. Over two thirds of the Kuwaiti population was obliged to flee the country and is now widely dispersed, while nearly a million foreign technicians and workers who were the mainstay of the service sector have been forced to abandon their jobs and return to their countries. The oil industry, which is the nerve centre of the economy, is in shambles, while other vital sectors of the infrastructure have been systematically sabotaged and plundered." 10/

24. The Farah Report also confirms that: "Inspection visits ... to all residential areas revealed widespread ransacking and vandalism of homes, shops and business enterprises." 11/

25. In a second report of 29 April 1991 by the same mission on assessing the loss of life and Iraqi practices against the civilian population, it is noted that interviews conducted by the mission revealed many instances of violations of one or more of the practices prohibited by the Fourth Geneva Convention. 12/ The Interim Farah Report observes:

> "The information received by the mission suggested that, in the early stages of the occupation, the Iraqi authorities had resorted to stringent measures with a view to suppressing any signs of resistance. This was followed at a later stage by the intensive searching of houses for any foreigners and members of the resistance movement who might be concealed there and punishment for those found to be harbouring them. Widespread arrests and the use of torture were reported to have occurred in an attempt to extract information on the resistance network. It was alleged that terror tactics against the civilian population were intensified towards the end of the occupation period. These took the form of arbitrary arrest and, in several cases, killing of people in front of their homes or families as well as the dumping of bodies in public places." 13/

26. The Commission on Human Rights of the Economic and Social Council appointed a Special Rapporteur, Mr. Walter Kälin, to investigate and report on the situation of human rights in occupied Kuwait. The Special Rapporteur visited Kuwait from June to September 1991 and interviewed

numerous persons who had remained in Kuwait during the occupation, as well as more than 80 victims or eye-witnesses of human rights violations allegedly committed by Iraqi occupying forces. He submitted a final report dated 16 January 1992. 14/ The Kälin Report observes that large numbers of the Kuwaiti armed forces were taken prisoner of war during the invasion, that during the early days of the occupation large numbers of civilians were arrested and detained by the occupying Iraqi forces, and that mass arrests were carried out by the occupying Iraqi forces just before their retreat. Many nationals from Member States of the Organization for Economic Cooperation and Development ("OECD") were used as "human shields". 15/

27. The Special Rapporteur received "extensive information regarding torture and cruel, inhuman and degrading treatment by Iraqi occupying forces". He also held extensive interviews with the persons who reported having been victims of torture, with doctors who had seen or treated many such victims, as well as with relatives of executed persons who saw traces of torture on the bodies of such individuals. In addition, he received photographic evidence of these occurrences which were corroborated by eye-witnesses or which were consistent with testimony provided by former detainees who had themselves been victims of torture. 16/ The Special Rapporteur also received "many reports of alleged violations of the right to life in situations hors de combat and in the context of detentions during the time of the occupation". 17/

28. The Panel is aware that "the level of health care in Kuwait, which used to be comparable to that of the most highly industrialized countries, was severely reduced as a consequence of the occupation of Kuwait by the Iraqi occupying forces". 18/ Before the invasion and occupation, Kuwait had 6 regional and 9 specialized hospitals as well as 72 health centres in operation. The World Health Organisation reported that the number of health professionals was reduced to 20 per cent of its previous level, and at the end of the occupation all the health centres were closed except 11 which were operating with reduced staff. 19/ This was due to the departure of a large number of health care professionals, the pillaging of health care facilities, the transfer of technical equipment to Iraq, and the denial of access to hospitals. 20/

29. The Panel has taken the view that it is necessary to take into account both the destruction and chaos inflicted upon Kuwait, as documented above, and the obvious haste with which many claimants had to leave Iraq and Kuwait, in assessing the adequacy of documentary evidence provided by claimants on a case by case basis as well as in defining criteria and evidentiary standards for category "D" claims.

III. WORK AND REPORT OF THE PANEL

30. The Panel's first preparatory meeting with the secretariat of the Commission was called on 9-10 December 1996, and thereafter four

substantive meetings were held on the following dates in 1997: 7-10 April, 28-30 May, 2-4 July and 1-3 September.

31. On 10 April 1997, the Panel issued its first Procedural Order ("Procedural Order No.1"). Procedural Order No. 1 sets out, inter alia, the determination of the Panel that Claim 3000001 is "unusually large or complex" within the meaning of article 38(d) of the Rules. 21/ In accordance with article 38(d) of the Rules, the Panel intends to complete its review of Claim 3000001 and submit a separate report with its recommendations to the Governing Council within twelve months of 7 April 1997 (the date of the first substantive meeting). In view of the unusual nature of the claim and for reasons of procedural fairness, Claim 3000001 was provided to the Government of Iraq for its review and comment.

32. Procedural Order No. 1 was transmitted to each Government and international organization which has a claim in the first instalment and to the Government of Iraq.

33. Procedural Order No. 2 was issued on 2 September 1997 in respect of the deferral of certain claims in the first instalment.

34. In preparing this report, the Panel took into consideration the information, views and materials provided to it by the secretariat in accordance with article 32 of the Rules. The Panel also considered the additional information and views provided by a number of Governments, including the Government of Iraq, in response to the issues raised in the Article 16 Reports. 22/

35. In its review of the claims in the first instalment, the Panel was particularly concerned that the interests of the claimants, who fled a war zone in haste and were therefore often unable to take documentary evidence with them, be balanced with the need to demonstrate that the claimed losses were caused as a direct result of the invasion and occupation of Kuwait.

IV. CATEGORY "D" CLAIMS PRE-PROCESSING

36. Prior to the submission of a category "D" claim to the Panel, the secretariat completes a number of steps. Annex I illustrates the life cycle of a claim from the time of receipt to final approval of a Panel recommendation by the Governing Council.

A. Receipt, registration and data entry

37. Upon arrival of a claim (step 1), the Commission's Registry issues receipts (steps 2 and 3) to the submitting entity. The claim is registered (step 4) at which point a unique claim number is assigned to the claim which serves as the identifier for tracking the claim during its processing cycle. Information in the claim is entered into the computerized claims database (step 5). Once loaded into the database, a quality control check

of the data is performed and, to the extent necessary, the data is corrected (step 6).

B. Article 14 assessment and article 15 notification

38. Thereafter, the secretariat undertakes the "article 14 assessment" to ascertain whether the claim meets the formal requirements set out under article 14 of the Rules. Article 15 of the Rules provides that, in respect of claims that do not meet the formal requirements, the claimant will be notified and given 60 days to remedy the defective claim. Such formal requirements include having to submit claims on the correct form and in English. In addition, prior to the formal 60-day remedy period, there is a six-month informal period authorized by the Governing Council during which defective claims may be remedied (step 7).

C. Article 16 reporting

39. Once the claims have been found to meet the formal requirements under article 14, in accordance with article 16 of the Rules, the Executive Secretary of the Commission issues quarterly reports to inform the Governing Council of claims received and the significant legal and factual issues raised therein (step 8). Such reports are also circulated to the Government of Iraq and all Governments and international organizations that have submitted claims. Within 90 days, the Government of Iraq, and any Government or international organization that has filed claims may present its additional information and views, which information and views are to be provided to panels of Commissioners considering the particular claims. It is only after a claim has been reported in an Article 16 Report that it can be submitted to a panel of Commissioners.

40. The Panel gave due regard to the responses of various Governments, and, in particular, the responses of the Government of Iraq, to the issues raised by the Executive Secretary in the Article 16 Reports in respect of the claims in the first instalment.

D. Substantive review and the final report

41. A cross-check is then performed by the secretariat to ascertain which claims have corresponding claims in other categories (step 9).

42. Prior to submission to the Panel, the secretariat groups the claims (step 10), develops proposed methodologies for each loss type, prepares claim summaries and, in respect of the more complex claims, legal memoranda (step 11). Once the Panel has reviewed the claims (step 12), established criteria and made individual determinations (step 13), the secretariat then applies the criteria to similar claims (step 14). The application by the secretariat of the Panel's criteria to similar claims is verified by the Panel. The final report contains the Panel's determinations and recommendations (step 15), and upon signature by the Commissioners (and subsequent translation into the other official United Nations languages),

it is submitted through the Executive Secretary (step 16) to the Governing Council for its approval (step 17).

V. GENERAL LEGAL FRAMEWORK

A. Applicable law

43. Article 31 of the Rules provides as follows:

> "In considering the claims, Commissioners will apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law."

B. Causation

44. In resolution 687 (1991) the Security Council:

> "Reaffirms that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."

45. The liability of Iraq arising out of the invasion and occupation of Kuwait thus having been established by Security Council resolution 687 (1991), the critical issue for the Panel to determine is whether the claimed losses are a "direct" result of Iraq's invasion and occupation. If the answer is in the affirmative, the main issues remaining are to determine whether, in view of the evidentiary standard discussed in chapter VI below, the evidence submitted in support of the claim is sufficient and, if that is the case, to assess the amount of the losses incurred.

46. In decision 7, paragraph 6, the Governing Council provided guidance as to the circumstances considered to be directly linked to Iraq's invasion and occupation of Kuwait. Direct loss, damage, or injury (including death):

> "... will include any loss suffered as a result of:
>
> "(a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;

"(b) Departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period;

"(c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;

"(d) The breakdown of civil order in Kuwait or Iraq during that period; or

"(e) Hostage-taking or other illegal detention."

47. In reference to decision 7, paragraph 6, the Governing Council stated in decision 15 (S/AC.26/1992/15), paragraph 6, that the above "... guidelines are not intended to be exhaustive. There will be other situations where evidence can be produced showing claims are for direct loss, damage or injury as a result of Iraq's unlawful invasion and occupation of Kuwait." 23/

48. The "D" claim form referred to above, approved by the Governing Council, contains ten pages of loss types that may be considered "direct" losses if they were the result of one of the above, or similar, circumstances.

49. Paragraph 9 of decision 7 makes it clear that "[c]ompensation will not be provided for losses suffered as a result of the trade embargo and related measures". Further guidance concerning the interpretation and application of this decision is provided by the Governing Council in decisions 9 (S/AC.26/1992/9) and 15. Decision 9 is in respect of business losses, and decision 15 explains that "[a]lthough the UN trade embargo was imposed in response to Iraq's invasion and occupation of Kuwait, losses suffered solely as a result of that embargo are not considered eligible for compensation because the causal link between the invasion and the loss is not sufficiently direct".

50. In addition to the guidance provided by the Governing Council in its decisions, regarding whether a particular loss should be considered "direct", relevant rules and principles of international law may also be considered. While one authority has stated that "[t]he rules of state responsibility offer little clear guidance on the criteria of direct loss", 24/ another authority has summarized relevant jurisprudence with the statement that "in the majority of cases, in which the epithets 'direct' and 'indirect' are applied to describe the consequences of an unlawful act, they are in fact being used synonymously with 'proximate' and 'remote'". 25/ Accordingly, the Panel considers the most commonly used test in damage claims is whether the act of a State was the "proximate cause" of the loss suffered, or whether that act was too remote to create liability. 26/

C. Subject matter jurisdiction

51. The subject matter jurisdiction for category "D" claims is defined in Governing Council decisions 1, 3, 7 and 8. 27/ These decisions establish, inter alia, the types of losses that are compensable under category "D".

52. Decision 7 establishes category "D" claims as individual claims over US$100,000. 28/ Paragraph 6 of decision 7 states that:

> "These payments are available with respect to any direct loss, damage, or injury (including death) to individuals as a result of Iraq's unlawful invasion and occupation of Kuwait."

Paragraph 7 continues in respect of category "D" claims:

> "These payments are available with respect to individuals who claim losses in excess of those compensable under claim forms B or C. These payments are also available with respect to individuals who have chosen not to file under claim form A, B or C because their losses exceed [US]$100,000."

53. Thus, while category "D" in principle consists of claims above US$100,000, some category "D" claims are for amounts under US$100,000 since they are "spillovers" from categories "A", "B" and "C". As described above, categories "A", "B" and "C" were created by Governing Council decision 1 to deal, on an expedited basis, with urgent claims.

54. Governing Council decisions 3 and 8 are in respect of MPA claims and are referred to in the appropriate sections hereafter.

D. Jurisdictional period

55. The language of decision 7, paragraph 6, suggests that Iraq's liability, generally, is related to events that occurred during the period 2 August 1990 to 2 March 1991. There is similar language applicable to category "A", "B" and "C" claims in paragraph 18 of decision 1.

56. The Panel considers that the occurrence of loss outside that time-frame imposes, in general, an extra burden on a claimant to provide an explanation as to why a loss occurring outside this time-period should be considered a direct result of Iraq's invasion and occupation of Kuwait. 29/

E. Location of loss

57. The wording of resolution 687 (1991), which refers to any direct loss, damage or injury resulting from Iraq's invasion and occupation of Kuwait, does not specify where such loss or damage should have occurred. Two provisions in paragraph 6 of Governing Council decision 7 are pertinent. Subparagraph 6(b) provides that claims for losses resulting from departure, inability to leave or decision not to return during the

relevant period must be made in relation to Kuwait or Iraq. Further, subparagraph 6(d) explicitly envisages the breakdown of civil order in Kuwait or Iraq during the relevant period as a cause of damage. Other than the two foregoing cases, there is no particular limitation on the location of the alleged loss for the Commission to have jurisdiction.

F. Ineligible claimants

58. Certain individuals are not eligible for compensation.

59. Decision 7, paragraph 11, states that: "Claims will not be considered on behalf of Iraqi nationals who do not have bona fide nationality of any other State."

60. Decision 11 (S/AC.26/1992/11) provides that "members of the Allied Coalition Armed Forces are not eligible for compensation for loss or injury arising as a consequence of their involvement in Coalition military operations against Iraq", except under certain specified conditions.

G. Currency exchange rate

61. The Panel finds that it is not possible to calculate the exchange rate individually for each category "D" claim. The Panel concurs with the reasoning and findings of the category "C" Panel on this issue, 30/ and finds that the currency exchange rate to be applied for the purposes of processing and paying category "D" claims is as follows:

1. Claims stated in Kuwaiti dinars

62. For claims stated, in whole or in part, in Kuwaiti dinars, the currency exchange rate to be applied is the rate of exchange on the pre-invasion date i.e. the rate in effect on 1 August 1990 for converting Kuwaiti dinars to United States dollars. 31/

2. Claims stated in other currencies

63. For claims stated, in whole or in part, in currencies other than the United States dollar or the Kuwaiti dinar, the currency exchange rate to be applied is the average rate in effect for the month of August 1990 for converting the particular currency or currencies to United States dollars. 32/

H. Interest

64. In paragraph 7 of decision 16 (S/AC.26/1992/16), the Governing Council has provided that: "Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award." The Governing Council further specified that: "Interest will be paid after the principal amount of awards", and decided that the methods of

calculation and payment of interest will be considered at the appropriate time. 33/

65. For reasons similar to those expressed in connection with the currency exchange rate to be applied, the Panel determines that "the date the loss occurred" as used in decision 16 should be a single fixed date for all category "D" claims. 34/ The Panel finds that the date of the invasion, 2 August 1990, shall serve as the date from which interest accrues.

VI. EVIDENTIARY STANDARD FOR CATEGORY "D" CLAIMS

A. General standard

66. Paragraph 1 of article 35 of the Rules imposes a general evidentiary requirement on all claimants:

> "Each claimant is responsible for submitting documents and other evidence which demonstrate satisfactorily that a particular claim or group of claims is eligible for compensation pursuant to Security Council resolution 687 (1991). Each panel will determine the admissibility, relevance, materiality and weight of any documents and other evidence submitted."

67. More specifically with respect to category "D" claims, paragraph 3 of article 35 of the Rules provides that:

> "... such claims must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss".

68. The "D" claim form provides the following general instructions on the cover page to the claimants in respect of the evidentiary burden:

> "Documentary and other appropriate evidence will also be required sufficient to demonstrate the circumstances and the amount of damages claimed. You will be informed if there is a need for additional information or documentation in this respect."

69. The Governing Council has put the responsibility on category "D" claimants to submit documents and other appropriate evidence sufficient to demonstrate both the circumstances of the loss and the quantum of the loss. The rule of actori incumbit probatio is recognized and applied in both municipal and international law, though with more flexibility in international law. 35/

70. As indicated above, the higher evidentiary burden placed upon category "D" claimants is an important distinguishing factor between

category "D" and categories "A", "B" and "C". The Panel emphasizes that each category "D" claim will be individually reviewed in order to ascertain whether it meets the evidentiary burden applicable. However, in doing so, the Panel has kept in view certain general considerations noted in the Background Reports such as:

(a) the circumstances in Kuwait and Iraq during the invasion and occupation and their impact on the claimants' ability to provide evidence in support of their claims, as summarized in chapter II above;

(b) the socio-economic characteristics and invasion-related circumstances of claimants from different countries; 36/

(c) the essentially "cash-transactions" economy of Kuwait 37/ and the absence of a tax structure so that receipts for expenditure do not carry the same import as in countries where they are necessary for tax deductions; and

(d) the extent to which national claims programmes of various claimant Governments were available to assist individual claimants. 38/

71. This evidentiary burden on category "D" claimants must also be balanced with the inherent fact-finding function of the Commission in general and of panels of Commissioners in particular. As the Secretary-General's Report of 2 May 1991 (S/22559), which laid the foundation for the creation of the Commission, noted, the Commission is not an arbitral tribunal before which parties appear; rather it performs an essentially fact-finding function of examining and verifying claims and evaluating the quantum of losses.

72. The Panel is aware that international tribunals, however composed, and entrusted with the task of adjudicating a dispute between two States belonging to whatever legal system or systems, have recognized the principle that the law of evidence in international procedure is a flexible system shorn of any technical rules. 39/ The Panel is also conscious of the fact that the lack of standard international law rules of evidence and the fact that international tribunals are liberal in their approach to the admission and assessment of evidence does not waive the burden resting on claimants to demonstrate the circumstances and amount of the claimed loss. On the other hand, considering the difficult circumstances of the invasion and occupation of Kuwait by Iraq, as outlined in the Background Reports referred to above, many claimants cannot, and cannot be expected to, document all aspects of a claim. In many cases, relevant documents do not exist, have been destroyed, or were left behind by claimants who fled Kuwait or Iraq. Accordingly, the level of proof the Panel has considered appropriate is close to what has been called the "balance of probability" as distinguished from the concept of "beyond reasonable doubt" required in some jurisdictions to prove guilt in a criminal trial. Moreover, the test

of "balance of probability" has to be applied having regard to the circumstances existing at the time of the invasion and loss.

73. The Panel also considers that in complying with the evidentiary standard prescribed by the Governing Council in article 35(3) of the Rules to the effect that category "D" claims have to be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss, the Background Reports compiled immediately after the ceasefire in Kuwait and referred to above represent in themselves significant documentary evidence of the circumstances of the losses claimed and also provide the background within which to consider the evidence for the amount claimed.

74. The Panel has therefore taken the view that to satisfy the required level of proof, in certain circumstances and in respect of certain loss types, significant weight must be given to, and reliance can be placed upon, a clear explanatory statement in support of the particulars in the "D" claim form.

75. An explanatory statement, to be acceptable to the Panel, must clearly state the nature and extent of the loss, it must make clear that the loss was a direct result of the Iraqi invasion and occupation, and it must clearly explain the reasons, regarded as credible and sufficient by the Panel, for the absence of any additional documentary evidence (hereinafter called an "Acceptable Explanatory Statement"). The Panel emphasizes that in future instalments it will have to evaluate whether an Acceptable Explanatory Statement alone will be sufficient for larger and more complex loss types, such as personal property, real property and business claims. This has yet to be determined.

76. The Panel is also mindful that the Government of Iraq has, under the Rules, limited procedural opportunities to put its case and make submissions. The Panel views its role as balancing the interests of claimants fleeing a war zone often under difficult circumstances and who are therefore in many cases unable to submit extensive evidence to document legitimate claims, with the interests of the Government of Iraq, which is only liable for damage and loss caused as a direct result of the invasion and occupation of Kuwait. Keeping these considerations in view, in the case of the largest claim in the first instalment, Claim 3000001, 40/ the Panel directed that the claim file be provided to the Government of Iraq for comments and submissions. In all other cases, the factors set out above were carefully taken into account, along with the factual background, the applicable law, and the article 16 responses of Governments, (in particular the Government of Iraq), (1) in setting the criteria for all methodologies and evidentiary standards, and (2) when claims in the first instalment were individually reviewed.

B. Additional information, hearings and experts

77. Although article 38(c) of the Rules states that "... Each panel will make its recommendations on the basis of the documents submitted ...", the Rules also provide scope to request additional information from claimants and the Government of Iraq, design and implement verification and valuation programmes with expert assistance and hold hearings.

78. Article 36 of the Rules states:

"A panel of Commissioners may:

"a) in unusually large or complex cases, request further written submissions and invite individuals, corporations or other entities, Governments or international organizations to present their views in oral proceedings;

"b) request additional information from any other source, including expert advice, as necessary".

79. The Panel found it necessary to make use of expert valuation assistance, as described hereafter. The Panel foresees that expert valuation assistance will be critical to the just and equitable resolution of many of the category "D" claims.

VII. OTHER CLAIM CATEGORIES

A. Determinations made by panels of Commissioners in other claim categories

80. In connection with reviewing the category "A", "B" and "C" claims, other Panels have considered many of the issues that will also be faced when processing category "D" claims. 41/ As noted above, there are of course factors that distinguish the "A", "B" and "C" claims categories from category "D" claims, perhaps the most important being the higher evidentiary standard in respect of category "D" claims. However, where relevant and appropriate, the Panel has had regard to and drawn upon the work and determinations of other Panels, thereby ensuring a level of consistency in the recommendations of panels of Commissioners.

B. Cross-category issues

81. An important issue faced by the Panel when considering the category "D" claims in the first instalment is the overlap with claims in other categories, in particular category "C" claims.

82. Individuals were given the option of filing the first US$100,000 of their losses under category "C" and the remainder of their losses under category "D", or of filing for all of their losses if they exceed

US$100,000 under category "D". In addition, category "D" claimants may have filed departure claims under category "A" and death or injury claims under category "B".

83. Prior to the presentation of claims in the first instalment to the Panel, the secretariat undertook a cross-check so that all related claims in categories "A," "B" and "C" could be located and attached to the category "D" claims in the first instalment. Thus, when reviewing each claim, the Panel had before it all the evidence furnished by the claimant in a complete claim file. In respect of future instalments, the secretariat will also have to undertake cross-checks within category "D" claims and with categories "E" and "F" (particularly in respect of D8/9 business claims).

84. Many claims in the first instalment have corresponding claims in category "C" that are pending. In some cases, claimants have claimed for the same items under categories "C" and "D". The Panel is of the view that in the interest of efficient and expeditious disposal of such claims, it should review and decide upon each such pending claim presented to it in the first instalment. In respect of all such claims, the secretariat is instructed to ensure that no duplicate payments are made. In view of the priority given to the payment of category "C" claims, the Panel is of the view that where possible, awards should be paid under category "C" rather than category "D", in accordance with the Rules and decisions of the Governing Council. 42/

VIII. PROPOSED METHODOLOGICAL APPROACH FOR CATEGORY "D" CLAIMS

85. Given the large number of category "D" claims and the wide diversity in respect of loss types and amounts, the Panel finds that a comprehensive methodology must be developed so that, in the first instalment and in future instalments, claims can be reviewed and decided upon fairly, consistently and with reasonable dispatch. In this connection, it is worth recalling some basic facts.

86. There are approximately 10,570 category "D" claims, each of which consists, on average, of two or three loss types. Therefore, there are in fact 20,000 to 30,000 distinct loss types to be reviewed and decided upon by the Panel. There is a wide variety in respect of the amounts claimed. Approximately 14 per cent of the category "D" claims are for amounts over US$1 million. The single largest claim is for US$370 million. Approximately 72 per cent of the claims are for amounts less than US$500,000, 57 per cent are for amounts less than US$300,000 and 18 per cent are for amounts less than US$100,000.

87. There are also a wide variety of loss types included in the category "D" claims. Claims have been filed for losses as diverse as death, loss of income, departure costs, loss of real property, business losses and loss of personal property. In respect of Kuwaiti claims (which constitute approximately one-half of the category "D" claims population), the most

significant loss types are D4 personal property, D7 real property and D8/9 business. The most significant loss types in respect of non-Kuwaiti claims are D1 departure, D4 personal property, D6 loss of income and D8/9 business losses.

88. Within each loss type there are also many variations. For example, under the loss type D4 personal property, there are claims for household goods, motor vehicles, yachts, jewellery, clothing, cash, artwork and so on. The real property D7 claims contain a wide variety as well, including loss of rental income, damage to different types of buildings in different areas of Kuwait and agricultural claims.

89. Further, there is a wide divergence with respect to the quality of the evidence and the presentation of the claims. Some Governments provided assistance to their claimants, generally resulting in a higher quality of claim presentation. The evidence provided ranges from no statements to comprehensive statements with loss adjuster reports, receipts, witness statements, etc.

90. The diversity of the claims summarized above poses considerable processing problems. It is expected that the following approach will ensure that the category "D" claims are processed efficiently and fairly.

A. Grouping

91. The Governing Council has provided guidance on how to process the category "D" claims. Article 17 of the Rules specifically provides for the categorization of the claims by the secretariat. 43/ Further, article 38(a) states: "In so far as possible, claims with significant common legal and factual issues will be processed together."

92. Grouping will allow precedents to be set and applied to similar claims, thereby making it possible to process claims presenting similar fact and legal issue patterns in an efficient and consistent manner. There are many possible grouping criteria, the most important of which is by loss type (i.e., D1 departure claims, D1 MPA claims, D4 personal property claims, D4 motor vehicle claims, etc.) which has therefore been adopted by the Panel.

93. As noted in chapter I above, in respect of the first instalment, other than the one "large or complex" claim (Claim 3000001), only seven loss types are included.

94. The processing of much larger instalments in the future will be assisted by a database of category "D" claims which will facilitate the grouping, application and tracking of the claims. The secretariat of the Commission is in the process of creating such a computerized database.

B. Precedent setting phase

95. In respect of the seven loss types included in the first instalment, namely D1 departure costs, D1(MPA), D3 death, D4 motor vehicles, D6 loss of income, D10 relief payments and D(Other), the Panel has established verification and valuation criteria, applied evidentiary standards and made decisions on individual claims, all as described hereafter.

96. The Panel will establish precedents for other loss types in future instalments.

C. Application phase

97. The Panel's goal has been to establish practical criteria and create a system that will lead to the fair, expeditious and efficient processing of claims consistent with the applicable law and the Rules. As larger numbers of claims are considered in future instalments, it is likely that new issues will emerge that will have to be considered and may well lead to modifications of the criteria established by the Panel.

98. For the application phase, the following procedure has been adopted, which the Panel believes is efficient in the circumstances and will lead to fair and consistent results, both in respect of the first instalment and future instalments. Once the verification and valuation criteria have been established for each loss type by the Panel, the secretariat will apply these precedents to similar claims in future instalments. The Panel will satisfy itself that its decisions have been accurately and consistently applied by the secretariat. This procedure will enable larger numbers of claims to be processed in future instalments. Claims that do not conveniently fit within groups for which precedents have been set or ad hoc claims that cannot be grouped (e.g., very large claims) will be brought to the attention of the Panel separately.

99. In deciding upon the relatively small number of claims in the first instalment, the Panel has been able to set precedents for several of the loss types in category "D". Specifically, the Panel estimates that precedents have been set in the first instalment for losses of a total value of about US$1.14 billion.

100. This will enable the secretariat to apply these precedents to a much larger number of claims to be presented to the Panel in future instalments, at which time the more complex loss types such as D4 personal property, D7 real property or D8/9 business claims will also be considered.

101. However, the Panel wishes to reiterate that all category "D" claims will be individually reviewed.

102. As the Panel's first report on category "D" claims, this report is necessarily comprehensive and somewhat lengthy. Once the criteria being established by the Panel are applied in future instalments to all category

"D" claim loss types, the Panel expects that future reports, though likely to be dealing with larger numbers of claims, will be relatively brief.

IX. D1 DEPARTURE COST CLAIMS

A. Introduction and factual background

103. Five of the claims in the first instalment are for losses due to departure from Iraq or Kuwait, inability to leave or return to Iraq or Kuwait or a decision not to return to Iraq or Kuwait ("D1(Money) claims").

104. The secretariat estimates that the total number of D1(Money) claims in the category "D" claims population is 2,050 for an asserted amount of approximately US$88 million.

105. The Panel considered the relevant background facts, in particular the estimated number of expatriates resident in Iraq and Kuwait and the departure patterns identified amongst Kuwaitis and expatriates, which have been noted in the Background Reports.

106. As described in chapter II above, over two thirds of the Kuwaiti population fled the country, while nearly a million foreign workers left Kuwait and Iraq and returned to their home countries. The mass exodus of those resident in Kuwait started a few hours after the invasion by Iraqi troops. 44/ In addition, since the invasion occurred at the height of the Persian Gulf summer, many Kuwaitis and expatriates were on holiday outside Kuwait.

107. The Panel notes that departees fleeing the Iraqi invasion and occupation of Kuwait would have had to leave in great haste. Many left overland thereby incurring various expenses which would have been very difficult to document. Those who were out of Kuwait on holiday would have had to incur unforeseen expenses due to their inability to return.

108. The Panel finds the foregoing facts to be of great importance and relevance when considering the D1(Money) claims, and in particular when establishing evidentiary criteria.

B. Applicable Governing Council decisions

109. Apart from the instructions provided to D1(Money) claimants on the category "D" claim form, decision 7, paragraph 6 sets out the criteria relevant for the compensation of D1(Money) claims. It reads as follows:

> "... payments are available with respect to any direct loss, damage, or injury (including death) to individuals as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of ... Departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period ...".

110. The Panel notes that the foregoing language employed by the Governing Council clearly restricts D1(Money) claims geographically to Iraq or Kuwait. In other words, claims may only be made for departure/inability to leave/decision not to return from or to Iraq or Kuwait.

111. Decisions 21 and 24 45/ of the Governing Council are relevant for category "D" claimants who have also filed departure claims in category "A". Decision 21 provides:

> "... any claimant who has selected a higher amount under category "A" (US$4,000 or US$8,000) and has also filed a category "B", "C" or "D" claim will be deemed to have selected the corresponding lower amount under category "A".

For any such claimant, where any amount is awarded against a category "D" claim, the Panel instructs the secretariat to make the necessary payment adjustment in accordance with the Rules and decisions of the Governing Council.

112. According to decision 24:

> "... for any claimant who has filed an individual claim in category "A" and has also filed a claim for departure losses in category "C" and/or "D", such departure losses in categories "C" and/or "D" may be compensated only insofar as the amount of such losses is determined to exceed US$2,500".
>
> "... for any claimant who has filed a family claim in category "A" and has also filed a claim for departure losses in category "C" and/or "D", such departure losses in categories "C" and/or "D" may be compensated only insofar as the amount of such losses is determined to exceed US$5,000".

113. In respect of any such claimants, the Panel further instructs the secretariat to make any necessary adjustments in accordance with the Governing Council's decision above against any amount awarded in category "D" (i.e., US$2,500 will be deducted from D1(Money) awards in respect of individual claimants who have been awarded such amount in category "A", and a corresponding deduction of US$5000 will be made in respect of family claimants).

C. Category "D" claim form requirements

114. The D1 page of the "D" claim form provides that a claim can be made for damages under the following headings: "departure", "inability to leave or return" and "decision not to return".

115. The "D" claim form requires the claimant to indicate which of the three circumstances mentioned above applies. The claimant is also required

to indicate the country from which he or she departed (i.e., Iraq or Kuwait), the departure date and the date of return. Further, the claimant must state under which items his or her losses fall and the amount of the loss. Compensation is payable for costs incurred under the following headings: "transportation", "lodging", "food", "relocation costs" and "other".

116. The instructions given to D1(Money) claimants read as follows:

> "Attach a statement describing what happened to you. If you departed, the statement should include the address of your last residence and last place you worked in Iraq or Kuwait and describe how you travelled from the last place where you lived or worked in Iraq or Kuwait to your ultimate destination. Attach copies of bills, tickets, receipts or other documentation showing amounts of your losses."

D. Factual description of D1(Money) claims

117. Items being claimed include the costs of transportation, lodging and food. In most cases, copies of exit stamps in passports are provided to show the date and fact of departure. Evidence of expenditure provided includes receipts for items such as airline tickets and hotel bills. Claimant statements explain the details of departure or inability to leave/return and provide lists of expenses incurred. In some cases, witness statements are also provided describing the circumstances and other details of the claimant's departure, dislocation and relocation.

118. Some claims were clearly submitted on the wrong loss page. For example, one claimant seeks compensation under D1(Money) for the loss of certain benefits arising from the loss of employment. The Panel considered such claims under the appropriate loss type, namely D6 loss of income.

E. Article 16 issues and responses

119. The Panel considers that the responses of Governments including the Government of Iraq, to the issues raised in the Article 16 Reports, provided particularly useful guidance.

120. Two issues were raised in the fifteenth Article 16 Report that pertain to the D1(Money) claims. One issue is in respect of how to evaluate whether relocation costs are compensable, and the second issue is whether departures from Kuwait or Iraq after the end of Iraq's occupation of Kuwait are compensable. 46/ Several Governments responded, including the Government of Iraq.

121. With respect to the first issue, Governments generally reiterated the view that only those expenses that are directly related to the invasion and occupation of Kuwait are compensable and that the compensability of each claim depends upon the facts in each case. One Government took the view

that relocation expenses are not compensable at all since they are not a direct result of the invasion and occupation. Another Government distinguished between "temporary and extraordinary" expenses incurred as a result of departure or decision/inability to return, which should be considered as direct, and "on-going ordinary living" expenses, which should be considered as an indirect consequence of the Iraqi invasion and occupation of Kuwait and therefore not compensable.

122. In respect of the second issue, while one Government stated that such claims ought to be rejected outright, Governments generally found that claims outside the "jurisdictional period" 47/ must be treated with caution. There may be bona fide reasons for such a departure, for example in the case of hostages taken by Iraq during the closing stages of the occupation and removed to Iraq.

F. D1(Money) methodology

123. The Panel having reviewed the D1(Money) claims in the first instalment; the responses of various Governments (including the Government of Iraq) to the issues raised in the Article 16 Report as set out above; the methodology adopted by the category "C" Panel 48/; the instructions set out on the D1 page of the "D" claim form; the factual background of the D1(Money) claims noted above and in the Background Reports 49/; as well as the applicable Rules and Governing Council decisions noted in paragraphs 109-113 above, adopts the D1(Money) methodology set out below.

124. As indicated in paragraph 114, the category "D" claim form provides that three different types of D1(Money) claims can be filed. The Panel considers that the distinction between the three types of claims may have been difficult for the claimants to follow, as demonstrated by the manner in which the D1 claim page has been completed by claimants. For evaluation purposes, the Panel is of the view that claims for "departure from Iraq or Kuwait" constitute one group ("departure claims"), and claims for "inability to leave or return" and "decision not to return" constitute another group ("relocation claims").

125. The Panel has adopted different methodologies for each of the two groups. Each stage of the methodologies adopted is set out below.

1. Departure claims

(a) Fact of departure

126. The Panel considers that, to be entitled to compensation, the claimant must show that he or she departed from Iraq or Kuwait and not from a third country. Departure must be evidenced by an exit stamp/visa, a used ticket or a boarding pass, or other like evidence. In addition, in view of the factual background described herein and in view of the evidentiary standard applicable to category "D" claims, an Acceptable Explanatory Statement 50/ must at least be provided.

(b) Departure to have occurred during the jurisdictional period

127. Claimants must demonstrate that the departure took place between 2 August 1990 and 2 March 1991 (the "jurisdictional period"). The date of departure should be proved in the same way as the fact of departure.

(c) Causal relationship to invasion of Kuwait

128. To be compensable, the loss incurred due to the departure from Iraq or Kuwait must be proved to have been a "direct" result of the invasion and occupation of Kuwait by Iraq. The Panel notes that Governing Council decision 7, paragraph 6 (b), provides that "departure" losses suffered during the jurisdictional period are a direct result of the invasion and occupation. The Panel holds that, to be compensable, the losses being claimed must be related to "temporary and extraordinary" expenses (such as departure related costs, e.g. travel fares, lodging and food while in transit; relocation costs, such as mileage costs incurred in locating a new residence, costs of moving to a new residence, short-term residential rental, short-term furniture rental and short-term automobile rental), as opposed to "on-going ordinary living" expenses (such as normal telephone charges, dental expenses, cable television services, school fees, etc.). 51/

(d) Valuation

129. In view of the evidentiary standard expected of category "D" claimants, the claimants must demonstrate the amount of loss. As indicated on the "D" claim form, claimants are required to attach bills, tickets, hotel receipts or other documentation showing the amounts of the losses.

130. Where the claimant is unable to attach adequate evidence, the Panel is of the view that given the fact that claimants were departing from a war zone, an Acceptable Explanatory Statement 52/ must at least be provided.

2. Relocation claims

(a) Fact of being unable to leave or return or reason for decision not to return

131. The Panel has taken the view that a claimant who is seeking compensation for "inability to leave or return" must demonstrate that he or she was unable to leave from or return to Iraq or Kuwait during the jurisdictional period. It can be inferred that an "inability to leave" could have been due to hostage taking or illegal detention, and an "inability to ... return" applies where the claimant was outside Iraq or Kuwait when the invasion occurred and could not return due to the Iraqi invasion and occupation of Kuwait. The actual circumstances must be explained in an Acceptable Explanatory Statement. 53/

132. The Panel has taken the view that claimants with a departure date prior to the jurisdictional period are clearly not entitled to costs incurred in connection with their departure but only to costs associated with their relocation. A claimant who shows that he or she was unable to leave during the jurisdictional period because of, for example, being held hostage or otherwise detained by the Iraqi authorities or because of a lack of transport and left thereafter, should be regarded as having demonstrated the requisite circumstances and ought to be compensated for departure costs. 54/

133. Further, the Panel considers that claimants who filed claims for "decision not to return" must show that they were outside Iraq or Kuwait when the invasion occurred. It can be inferred that claimants would have decided not to return because of the occupying Iraqi forces. The circumstances must be explained clearly in an Acceptable Explanatory Statement. 55/

(b) Causal relationship to the invasion of Kuwait

134. To be compensable, the loss incurred due to the claimant's inability to leave or return or decision not to return must be demonstrated to have been a "direct" result of the invasion and occupation of Kuwait by Iraq. It must be shown that the loss was clearly attributable to the events that occurred between 2 August 1990 and 2 March 1991.

(c) Valuation

135. The Panel is of the view that relocation claims should be valued in the same manner as departure claims (see paragraphs 129-130 above).

G. Panel determinations on D1(Money) claims

136. The Panel notes that, generally speaking, D1(Money) claims are not for large amounts.

137. The Panel has approved D1(Money) claims where, in its judgement, the "D" claim form particulars, and the documentary evidence attached adequately support the claim made. Where only part of the claim is supported, only such part has been approved. In the absence of bills, hotel receipts or other usual evidence of expenditure, an Acceptable Explanatory Statement enumerating the expenditure has been regarded as sufficient for only such part of the expenditure that the Acceptable Explanatory Statement 56/ supports.

138. One D1(Money) claim is in respect of benefits arising from an employment contract. This claim was considered by the Panel under D6 loss of income.

139. One departure claim was rejected by the Panel because it is clear from the evidence that the departure occurred outside the "jurisdictional

period"; no reasonable explanation (such as having been taken hostage) was provided as to why this occurred. Further, in order to avoid double compensation, the Panel rejected D1 claims which duplicate C1 claims that have been approved by the category "C" Panel.

X. D1(MPA) CLAIMS

A. Introduction and factual background

140. In the first instalment, there are seven D1 claims for mental pain and anguish resulting from circumstances where the claimant was taken hostage, illegally detained or forced to hide ("D1(MPA) claims").

141. The secretariat estimates that the total number of D1(MPA) claims in the category "D" claims population is 580. There is no asserted value for D1(MPA) claims since the "D" claim form does not allow a claimant to set out a claimed amount.

142. From its review of the Background Reports, the Panel notes the evidence of extensive hostage taking and forced hiding, and furthermore that large numbers from among members of the Kuwait armed forces and civilians were arrested and detained by the occupying Iraqi forces.

143. According to the Kälin Report, "large numbers of the Kuwaiti armed forces ... were taken prisoner of war. They were all transferred to Iraq and detained throughout the occupation." 57/ Large numbers of civilians, mostly Kuwaitis but also citizens of other Arab countries, were arrested and detained by the Iraqi forces during the occupation. 58/ There were approximately 9000 nationals of OECD countries in Kuwait before 2 August 1991, the date of the Iraqi invasion. Nationals of OECD countries were ordered to report to the Iraqi authorities on 16 August 1990, and were subsequently deported to Iraq and obliged to remain there. Some were used as "human shields" at various strategic sites. 59/

B. Applicable Governing Council decisions

144. Apart from the instructions provided to D1(MPA) claimants on the "D" claim form, and the Governing Council's general indication in decision 1, paragraph 6, that claims for MPA would also be considered, three decisions of the Governing Council are relevant in respect of D1(MPA) claims. 60/

145. Paragraph 6 of Governing Council decision 7 provides, in part, that category "D" claims may be made for "hostage taking or other illegal detention".

146. According to decision 3, all references to detention and hiding must be understood to mean detention and hiding in Iraq or Kuwait. The decision goes on to state that the terms "detention" and "detained" are to be interpreted in a "restrictive manner" and are to mean "the holding of persons by force in a particular location by Iraqi authorities".

147. In respect of forced hiding, the requirement in the "D" claim form (see below) that forced hiding is to be on account of a "manifestly well-founded fear" is also to be interpreted in a "restrictive manner" and should be taken to mean "a fear based upon clear indications that Iraqi authorities were seeking to kill or detain the individual in question or some group of which he or she was a member". 61/

148. Decision 8 sets out the compensation payable and the ceilings for MPA claims. They are as follows:

(a) for being taken hostage or illegally detained for more than three days, (or for a shorter period in circumstances indicating an imminent threat to life), US$1,500 per claimant plus US$100 for each day taken hostage or illegally detained beyond three days, up to a ceiling of US$10,000 per claimant; or

(b) for being forced to hide in Iraq or Kuwait for three days or more, US$1,500 per claimant plus US$50 for each day the claimant was forced to hide beyond three days, up to a ceiling of US$5,000 per claimant.

149. Decision 8 further states: "These amounts are payable cumulatively where more than one situation applies with respect to particular claimants." The amounts payable are subject to the overall ceilings applicable, which are US$30,000 for individuals and US$60,000 per family unit.

C. Category "D" claim form requirements

150. The D1 page of the "D" claim form provides that claims for mental pain and anguish resulting from being taken hostage or illegally detained can only be made under three circumstances, namely,

(a) for being taken hostage or illegally detained for more than 3 days; or

(b) for being taken hostage or illegally detained for a shorter period in circumstances indicating an imminent threat to a claimant's life; or

(c) for being forced to hide for more than 3 days on account of a manifestly well-founded fear for claimant's life or of being taken hostage or illegally detained.

151. The claimant is required to indicate which of these circumstances apply and, as applicable in the case of (a) or (c), the number of days.

152. The instructions given to D1(MPA) claimants read as follows:

"Attach documentary and other appropriate evidence of the above circumstances."

D. Factual description of D1(MPA) claims

153. As required by the "D" claim form, all the claimants indicated the number of days they were held hostage, illegally detained or forced to hide. Most of the claimants have attached statements describing the circumstances under which they were held hostage, illegally detained or forced to hide. Most of the claims are for being taken hostage or illegally detained for more than three days.

154. In addition, the claimants have provided documentary evidence of presence or residence in Iraq or Kuwait during the jurisdictional period and evidence showing their asserted date of departure.

E. Article 16 issues and responses

155. No D1(MPA) issues were raised in the Article 16 Reports.

F. D1(MPA) methodology

156. The Panel, having reviewed the D1(MPA) claims in the first instalment; 62/ the instructions set out on the D1 page of the "D" claim form; the factual background of the D1(MPA) claims noted above and in the Background Reports; the applicable Rules and the Governing Council decisions noted in paragraphs 144-149 above as well as the methodology adopted by the category "C" Panel, adopts the D1(MPA) methodology set out below.

1. Fact of presence

157. Residence or presence in Iraq or Kuwait is a necessary prerequisite for all successful D1(MPA) claims.

158. Residence can be inferred from the claim file (such as by an employment contract or Kuwait Civil Identification Number or demonstrated by specific documents such as a driver's licence or exit stamps in a passport). Proof of residence is less likely to be an issue in respect of Kuwaiti nationals.

2. MPA claims for being taken hostage or illegally detained for more than three days

159. First, the claimant must indicate on the claim form that the claim is for being taken hostage or illegally detained for more than three days.

160. Second, the claimant must establish the fact of being held hostage or illegally detained. The Panel recognized that, given the circumstances, it might be difficult to clearly prove the fact of having been taken hostage, illegally detained or forced to hide or the exact number of days of such occurrences. Taking into account both the factual background described earlier in this report and the evidentiary standard prescribed for category

"D" claims, the Panel finds that the fact of being held hostage or illegally detained can be established by way of:

(a) a communication from the claimant's Government; or
(b) an Acceptable Explanatory Statement, 63/ which must set out the details of having been taken hostage or illegally detained; or
(c) documentation attached to the "D" claim form such as a witness statement; or
(d) other relevant external information. 64/

161. Third, the claimant must indicate the number of days of captivity. This must be indicated in the appropriate box on the "D" claim form. In addition, the evidence submitted in support of the claim (i.e., one of the types of evidence noted above) must also confirm the number of days of captivity.

162. The compensation payable is set out in decision 8 and noted in paragraph 148 above.

3. MPA claims for being taken hostage or illegally detained for three days or less in circumstances indicating an imminent threat to the claimant's life

163. There are no such claims in the first instalment; accordingly the Panel has not found it necessary to establish criteria for such claims at this stage.

4. MPA claims for forced hiding

164. First, the claimant must indicate on the "D" claim form that the claim is for forced hiding.

165. Second, a claimant seeking compensation for forced hiding must demonstrate that he or she was indeed forced to hide and that such hiding was on "account of a manifestly well-founded fear" for his or her life or of being taken hostage or illegally detained. Again, the Panel notes the difficulty a claimant may have in proving that he or she was forced to hide. Consistent with the view expressed in paragraph 160 above, the Panel finds that a claimant must establish the fact of having been forced to hide by providing the following type of evidence:

(a) a communication from the claimant's Government; or
(b) an Acceptable Explanatory Statement; 65/ or
(c) documentation attached to the "D" claim form such as a witness statement; or
(d) other relevant external information.

166. The Panel concurs in the view taken by the category "C" Panel in the First "C" Report that persons in certain categories could be considered to

have been forced to hide on account of a "manifestly well-founded fear" for their lives or of being taken hostage or illegally detained. 66/ The Panel clarifies that Acceptable Explanatory Statements 67/ or other documentary evidence should establish the fact of the claimant belonging to any of the listed categories.

167. Third, the claimant must indicate the number of days during which he or she was forced to hide. This must be clearly stated on the claim form and, in addition, confirmed in the supporting evidence.

168. The compensation payable is set out in decision 8 and noted in paragraph 148 above.

G. Panel Determinations on D1(MPA) claims

169. Generally, claimants set out in some detail in an Acceptable Explanatory Statement 68/ the events surrounding their having been taken hostage or illegally detained. Several nationals of OECD countries explained that, when attempting to flee Kuwait through Iraq, often in convoys, they were detained by the Iraqi forces and held at various detention centers in Iraq. One claimant, who was working in Iraq as an expatriate, was similarly detained by the Iraqi forces. Another national of an OECD country was forced to hide, together with his wife, which is described in a diary he kept. The husband's and wife's accounts of the forced hiding are consistent.

170. All of the D1(MPA) claims in the first instalment satisfied the criteria established herein by the Panel and, accordingly, were approved and awards recommended in accordance with Governing Council decision 8. In one case, the evidence submitted indicated that the number of days of "illegal detention" was slightly lower than the number claimed by the claimant; the Panel has recommended an award of an amount based upon the lower correct number of days.

XI. D3 DEATH CLAIMS

A. Introduction and factual background

171. There are 13 claims for damages arising from the death of a spouse, child or parent ("D3 claims") in the first instalment. The claims are for loss of support that the claimants would have received from the deceased, burial and other expenses incurred in respect of the deceased, as well as MPA for the fact of death or for witnessing the death of a spouse, child or parent.

172. The secretariat estimates that there are approximately 170 D3 claims in the category "D" claims population, for an asserted amount of approximately US$50 million, covering claims for loss of support and expenses. This amount does not include claims for MPA as there is no

provision on the D3 page of the "D" claim form for the claimant to assert amounts for MPA.

173. In its review of the D3 claims, the Panel has drawn upon aspects of the Background Reports describing the causes of death during the invasion and occupation of Kuwait, which were also taken into account by the category "B" and category "C" Panels 69/ in their review of death claims submitted in each of those categories. The Panel has noted in particular a statement in the Kälin Report that during the invasion and occupation of Kuwait, there were grave violations of the right to life as set out in article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights. While the loss of life could be attributed in part to armed conflict, cases of arbitrary and summary execution were widespread. 70/ The Report goes on to say that:

> "Persons were often executed after having been tortured. This often happened without trial. Where trials took place, they did not comply with the relevant fundamental guarantees of fair trial, including those applicable in times of war. Evidence indicates that executions in public or in front of families and the exposure of dead bodies in public were carried out for the purpose of spreading terror among the civilian population. In other cases deaths were due to the general conditions in places of detention in both Kuwait and Iraq." 71/

174. Further, as the Panel has already noted above at paragraph 28, health care facilities in Kuwait were reduced as a result of a sharp decline in the number of health care professionals, the closing, dismantling and pillaging of health care facilities, and as a result of limitations in access to hospitals. 72/

175. The Kälin Report states that deaths occurred in Iraq as a result of the conditions under which detainees were held, and as a result of maltreatment of detainees by Iraqi soldiers. Persons who were detained in Iraq also died due to a lack of proper medical assistance. The Iraqi authorities did not register the number of deaths in detention, therefore the number of deaths in Iraq cannot be ascertained. 73/ One D3 claim in the first instalment is in respect of a death that was caused by a SCUD misssile attack by Iraq on Israel.

B. Applicable Governing Council decisions

176. Paragraph 6 of Governing Council decision 7 states that: "payments are available with respect to any direct loss, damage or injury (including death) to individuals as a result of Iraq's unlawful invasion and occupation of Kuwait". (Emphasis added.)

177. Paragraph 7 of decision 7 goes on to explain that payments are available with respect to individuals who can claim losses in excess of those compensable under claim forms "B" and "C", or individuals who have

chosen not to file under claim forms "A", "B" or "C" because their losses exceed US$100,000.

178. The Governing Council stated inter alia in decision 3 that compensation will be provided for non-pecuniary injuries resulting from MPA where a spouse, child or parent of a claimant died or where the individual witnessed the death of the spouse, child or parent.

179. Governing Council decision 8 prescribes compensation payable in respect of various categories of MPA. Where the spouse, child or parent of a claimant died, the ceiling is fixed at US$15,000 per claimant or US$30,000 per family unit. Where an individual witnessed the intentional infliction of events leading to the death, the ceiling specified is US$2,500 per claimant and US$5,000 per family unit.

180. As noted above in chapter X, section B, the total amount payable for MPA to claimants is subject to a ceiling of US$30,000 per individual claimant, and US$60,000 per family unit.

C. Category "D" claim form requirements

181. Claims arising from death are required to be set out on the D3 page of the "D" claim form. The "D" claim form describes the circumstances under which a claimant who might have submitted a claim in category "B" can submit a D3 claim as follows:

> "If you have made a claim for the death of your spouse, child or parent by means of claim form "B," you may only file a claim for damages for death under this form if you can prove that your losses exceed US$2,500."

182. The claimant is required to give the following details: the deceased's full name; the deceased's official identification number, the claimant's relationship to the deceased i.e., whether the deceased was the claimant's spouse, child or parent; how the deceased died; the date of death; the occupation of the deceased; and the name of the deceased's employer.

183. Claimants are asked to provide documentary evidence of the claimant's relationship to the deceased. The instructions given to D3 claimants also require the claimant to: "Attach a photocopy of a marriage document, birth certificate or any other official record."

184. Instructions to claimants concerning the circumstances and date of death are as follows: "Attach documentary and other appropriate evidence such as a photocopy of a death or burial certificate and a separate sworn statement describing the cause and circumstances of death."

185. There are three types of losses that may be claimed in respect of death: loss of support; losses where the claimant has incurred expenses

such as medical and burial costs in respect of the deceased; and damages for MPA arising from death or witnessing the death.

186. In relation to a claim for loss of support, the claimant is asked to state both the earnings of the deceased in the twelve month period prior to 2 August 1990 and the monthly support given by the deceased to the claimant during that period. The claimant is also asked to specify the total amount being claimed for loss of support.

187. The claim form lists medical and burial expenses as two types of expenses that can be claimed. There is provision also on the claim form to claim "other" expenses. The instructions on the claim form as to evidence state: "Attach documentary and other appropriate evidence, such as itemized bills of expenses incurred or itemized receipts of payments made."

188. If there is a claim for MPA, the claimant is required to check the appropriate box on the claim form specifying whether MPA is being claimed for death or for witnessing the intentional infliction of events leading to death. The instructions further require that:

> "Claims for mental pain and anguish resulting from death and for witnessing the death of your spouse, child or parent must be substantiated by documentary and other appropriate evidence of the death and its circumstances."

D. Factual description of D3 claims

189. All the D3 claims in the first instalment have a related category "B" claim, and all but one, have a related category "C" claim.

190. The claims reviewed by the Panel relate to deaths that occurred in Iran, Iraq, Israel and Kuwait. The following were listed by claimants as causes of death: executions by Iraqi forces; lack of medical care; landmine explosions; and heart attacks brought on by the fact of being held hostage in Iraq and in one case by a SCUD missile attack on Israel. All of these circumstances are referred to among the events described in the Background Reports as having been causes of death arising out of the invasion and occupation of Kuwait by Iraq.

191. In eleven claims, the date of death fell within the jurisdictional period of the invasion and occupation. In the case of two claims, deaths were caused by land mine explosions which occurred after 2 March 1991. All claimants submitted documentation such as death certificates proving the fact of death and the date of death.

192. The deceased include children, students, a housewife, and employed pe sons of various ages. One of the deceased was a member of the Kuwaiti military forces who died in the first days of the invasion and occupation. The claimants provided documentation such as birth and marriage

certificates which clearly proved that their relationship with the deceased was such that they were eligible to claim under the D3 loss type.

193. In all cases claimants submitted claims for loss of support and, where the deceased was employed, proof of employment and earnings accompanied the claim; all but one claimant submitted MPA claims for death; three claimants included MPA claims for witnessing the death.

194. Only one claimant included a claim for various expenses, such as burial costs. Generally, the claimant submitted invoices showing the amounts paid.

E. Article 16 issues and responses

195. The fifteenth Article 16 Report raised two issues which are relevant to the Panel's review of the D3 Claims in the first instalment. The first issue is in respect of the methodology to be used in calculating loss of future earnings, and the second issue is whether death as a result of lack of medical care can be attributed directly to the invasion and occupation of Kuwait, and if so, whether the loss is compensable. 74/ Several Governments responded including the Government of Iraq.

196. On the first issue, one Government stated that awards for loss of future income should be compensable, but considered that payment in the form of a capital sum would be preferable to instalments spread over a period of time, which would be difficult to manage. Another Government took the view that loss of future income is not a direct loss arising from the invasion and occupation of Kuwait and is therefore outside the jurisdiction of the Commission.

197. Regarding the second issue, one Government put forward the view that deaths arising from a lack of medical care are compensable as a direct loss and damages must be considered carefully in light of the documents submitted. Another Government stated that once a claimant has been compensated under category "B" there should be no further compensation paid under category "D". The Panel views that opinion as being contrary to decision 7 and the purpose of category "D" claims in general, which is to compensate claimants who can prove losses in excess of those that can be compensated under categories "A", "B" and "C".

F. D3 methodology

198. The Panel, having reviewed the D3 claims in the first instalment; the responses of various Governments (including the Government of Iraq) to the issues raised in the Article 16 Reports as set out in paragraphs 195-197 above; the factual background noted above in the Background Reports; the applicable Rules and Governing Council decisions noted above as well as the methodologies adopted by the category "B" and "C" Panels, adopts the D3 methodology set out below.

1. Conditions precedent for D3 Claims

(a) Fact of Death

199. The claimant must establish the fact of death. The D3 page of the claim form asks the claimant to attach documentary evidence and other appropriate evidence such as a photocopy of a death or burial certificate.

(b) Causation

200. In accordance with Security Council resolution 687 (1991) and Governing Council decision 7, a claimant must establish that the death was a "direct" result of the invasion and occupation of Kuwait.

201. Where death occurred outside the jurisdictional period of the invasion and occupation, the claimant has a greater burden to show the causal link to the invasion and occupation. There are two D3 claims in the first instalment where death was caused by landmine explosions after the jurisdictional period. The Panel views such deaths as being directly caused by Iraq's invasion and occupation of Kuwait. 75/

202. In respect of the D3 claim where the claimant's spouse died as a result of a SCUD missile attack against Israel, the Panel is of the view that such attacks fall within the provisions of decision 7, paragraph 6, which states that payment is available for losses suffered as a result of, inter alia, "Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991." Therefore, if the loss is direct, it is compensable regardless of the country in which the deceased suffered the attack.

203. The Panel also considered a claim submitted by the father of a young child who died due to lack of medical care. The child had been born with a kidney ailment and required medical treatment on a regular basis while awaiting a kidney transplant. The parents left Kuwait during the occupation when the required medical treatment was no longer readily available after the extensive pillaging of medical equipment and the child subsequently died. The Panel took into account the facts stated in the Background Reports concerning the destruction and stripping of medical facilities in Kuwait. The Panel takes the view that where a person was sick before the invasion and occupation and died as a result of lack of medical care due to the reduction and looting of medical facilities, the death in that case can be attributed directly to the invasion and occupation of Kuwait.

(c) Family relationship

204. In accordance with decision 1, the family relationship between the deceased and the claimant must be established. Persons eligible to claim are the spouse, child or parent of the deceased. The claimant is required to provide proof of the relationship and the claim form specifies that the

claimant should attach a photocopy of a marriage document, birth certificate, or any other official document.

2. Claims for expenses

205. Only one D3 claimant in the first instalment submitted a claim for expenses incurred as a result of death. The claim was for burial expenses and the cost of a gift made to an institution in memory of the deceased. The claimant provided invoices for all the costs incurred.

206. The Panel considered the extent to which burial expenses should be compensable. Given the diversity of claimants with respect to their geographical location and differences in custom, the Panel determined that such expenses as can be deemed reasonable in light of the claimant's and the deceased's geographical location and custom, should be compensable. Claimants must provide documentary proof of the expenses incurred, or an Acceptable Explanatory Statement 76/ which describes the items and amounts spent.

207. With regard to "other" expenses, the Panel took the view that the Governing Council intended to compensate claimants for expenses that would be incurred in locating the deceased's body or repatriating the remains of the deceased. The Panel found that where the expenses claimed appear not to be directly linked to the fact of death, but arose as a result of a personal decision of the claimant, then no award should be made. The Panel recommends that no compensation be awarded in respect of the claim, described at paragraph 205 above, for expenses associated with the donation of a gift in memory of the deceased. All other expenses were found to be directly compensable and the Panel recommends payment of compensation.

3. Claims for loss of support

208. In deciding the methodology to be applied to claims for loss of support, the Panel considered it essential to take into account the personal circumstances pertaining to the deceased and the claimants, 77/ as well as demographic and actuarial assumptions applicable to the D3 claims population. In its review of the D3 claims for loss of support, the Panel found that the claims fall into two groups: (1) in eight of the thirteen claims, the deceased was gainfully employed prior to 2 August 1990, and the claimants have evidence of the deceased's earnings in the twelve months prior to that date, as required by the "D" claim form; (2) in the remaining five claims, the deceased was not gainfully employed and therefore no income could be attributed to the deceased.

209. Based on the circumstances of the deceased prior to death, the Panel felt it necessary to distinguish between the two groups. The Panel requested the secretariat to retain actuaries to assist it in determining the actuarial principles to be applied and had the benefit of discussing various issues at a meeting with a representative of the actuaries firm. 78/

210. The Panel examined the view taken by the category "C" Panel that in accordance with actuarial principles, in situations where the deceased was gainfully employed prior to death, compensation is based on the present value of the deceased's future income. The Panel concurred with and adopted this approach. 79/

211. Where the deceased had no personal income, the Panel found that the unpaid contribution of a wife and mother to the welfare of the family has a financial value which is recognized in both international and municipal law. 80/ While the contribution of a wife and mother gives rise to the most important and legitimate claims for compensation, the Panel views the family as an economic unit in which each member makes a contribution. The Panel therefore recommends that where the deceased had no income, lump sum payments should be awarded, with the amounts varying according to the relationship of the claimant to the deceased. The Panel adopts the methodology set out below in respect of the two groups.

(a) Awards for claims where the deceased was earning an income

212. The Panel considered the following actuarial principles as those that should be applied to cases where the deceased was earning an income prior to 2 August 1990:

(a) Had death not occurred, the deceased would have had an expectation of life equal to that of a person of the same sex, age and nationality, as indicated in the most appropriate available life tables; 81/

(b) had death not occurred, the deceased would have continued to earn and to provide support to his eligible dependents during the deceased's life-span;

(c) the level of earnings of the deceased would have decreased after reaching normal pensionable age; 82/

(d) compensation should be assessed on the basis of the family unit composition at the time of death, disregarding its further modification; 83/

(e) compensation should be paid on the basis of the deceased's earnings at the time of death.

213. Mindful of the fact that the D3 claims in the first instalment represent less than 10 per cent of the total D3 claims population, and that the claims were submitted by claimants from three submitting entities, the secretariat compiled a list of all the entities that have submitted D3 claims, and requested the actuaries to make recommendations based on the demographic characteristics of the total D3 claims population. 84/

214. The recommendation of the actuaries was that in view of the number of submitting entities involved, and the need to develop a methodology that is simple to apply yet takes into account differences in the economic factors relevant to the methodologies that were developed, the claims should be divided into three nationality groups. 85/

215. Compensation is payable to the claimants in the form of a capital sum, actuarially equivalent to the presumed amount of financial support that the deceased would have expected to provide thoughout the deceased's expected lifetime. The assumption is that the capital sum being available initially and invested to earn a compound interest rate (i) for (n) years would ensure payment of an annuity of 1 for (n) years. The capital sum is discounted to arrive at the present value of the annuity. The crucial factor in deciding the amount to be awarded is the discount rate to be applied. This approach is consistent with the recommendation made by one Government when the issue of compensation for loss of support was raised in the fifteenth Article 16 Report, as noted at paragraph 196 above.

216. The discount rate is a function of two factors: firstly, the probability of earning in future years a given yield on the capital invested - this requires that an assumption be made about the future return on prudent and safe investments; and secondly the purchasing power of the capital sum awarded to claimants - which depends on assumptions about future inflation. Both assumptions have to be considered in the context of the economic conditions and financial market experience of the deceased's country of origin.

217. Therefore, the actuaries had to establish the discount rate to be applied. Taking into account the economic conditions pertaining to the return on investment 86/ and inflation 87/ in the submitting entities as grouped by the actuaries, the Panel considers that a discount rate of 5 percent per annum should be applied in determining compensation to be paid to claimants from Group "1" countries, 88/ and 3 per cent per annum where claimants are from Group "2" and Group "3" countries. 89/

218. A further consideration in respect of the claims for loss of support where the deceased was earning an income, is the assumption that the yearly income of any individual is not entirely used to provide support to the family unit. Part of the income is used for personal consumption and for living expenses. Therefore, the loss of support suffered by claimants should be assessed by deducting a certain percentage from the capital sum representing the deceased's future income, reduced to its present value. The actuaries recommended a percentage of 40 per cent where there is one dependent, and 25 per cent where there is more than one dependent. 90/ The Panel finds the percentages recommended by the actuaries to be reasonable and adopts them for purposes of determining the final amounts to be awarded to claimants.

219. In order to assist the secretariat in applying various aspects of the methodology, the actuaries developed a series of calculations to be used in

determining the amounts to be awarded to claimants. As the methodology is based on the deceased's total life expectancy, the amounts computed represent the total amount that should be shared amongst all the surviving dependents, and therefore, the total amounts that should be awarded in respect of any amounts claimed under categories "C" and "D" for loss of support.

220. Claimants with claims for loss of support in the first instalment, are spouses or parents of the deceased. In addition to proving the fact of death, the causal link between the death and the invasion and occupation and the family relationship, claimants submitted certificates issued by the former employers of the deceased as evidence of the fact of employment and of the deceased's monthly income. The Panel notes that only one claimant gave some evidence of support. In the remaining claims, the claimants either included a statement to the effect that they had received support from the deceased, or filled the amount being claimed as support in the appropriate section of the "D" claim form.

221. The Panel recognizes the fact that where the claim is for loss of support, domestic transfers within families are seldom documented. Where appropriate, the Panel has taken the view that an Acceptable Explanatory Statement should be considered sufficient evidence of the loss suffered by the claimant. 91/ Except in one claim, where the claimant provided some evidence of transfers by the deceased to the claimant's personal account, claimants did not generally provide direct evidence of support.

222. The formula adopted by the Panel was applied to all the claims and the Panel recommends that compensation be awarded on the basis of the results of those calculations in accordance with the above-mentioned principles. Given that the formula calculates the total amount to be paid to the claimant from the time of death, and a portion of this amount covers the claim for support submitted by the claimant in category "C", the Panel determines that any amounts awarded for loss of support in category "C" should be deducted from the amounts awarded under category "D".

(b) Lump sum awards

223. As stated above at paragraph 211, the Panel views the family as an economic unit to which each member makes a contribution, therefore lump sum payments would be justified in the D3 claims in the first instalment where the deceased had no personal income. Compensation is based on the expected economic contribution to the household or potential earning capacity of each member of the household which was lost. In drawing up the sums to be awarded, the Panel considered that certain characteristics pertaining to the deceased and the claimants be taken into account as follows:

a. The Panel has given equal weight to the contribution of a husband and wife within the home where one or the other was not employed;

b. if the deceased is a spouse over the age of 55, there is an assumption that there are no dependent children unless there is evidence to the contrary;

c. the age of 55 was used as a cut off point to coincide with the normal retirement age of 55, as established under Kuwaiti Social Security Legislation; 92/

d. compensation in respect of spouses over the age of 55 is reduced to account for reduced income after retirement;

e. compensation for children whose parents are not claimants is based on a sum of $5,000 per annum for a period of 5 years;

f. Children are assumed to be dependent up to the age of 21. 93/

Accordingly, the Panel recommends that lump sum awards be made to claimants as set out in the table below:

Claimant's Relationship with Deceased	The Deceased Was:					
	Child	Spouse Without Dependent Children		Spouse With Dependent Children		Parent
		under 55	over 55	under 55	over 55	
Father/Mother	$10,000 each	N/A	N/A	N/A	N/A	N/A
Spouse	N/A	$100,000	$60,000	$100,000 + $15,000 per dependent child	$60,000 + $15,000 per dependent child	N/A
Child under 21 without parent claiming	N/A	N/A	N/A	N/A	N/A	$25,000 for loss of each parent

224. All claimants with claims for loss of support in cases where the deceased had no personal income submitted evidence proving the fact of death, the causal link between the death and the invasion and occupation of Kuwait, and the family relationship.

225. The Panel considered four claims submitted by parents of deceased children aged between 2 and 21 years. In two cases only the father was eligible to claim as the mother was an Iraqi citizen. The Panel recommends that an amount of $10,000 be awarded to each claimant.

226. The remaining claim where the deceased was unemployed, was that of a husband claiming in respect of his deceased wife who had been a housewife. The children of the marriage, who are over the age of 21, have been included as additional family members on the DID.2 page of the "D" claim form. In view of the fact that the deceased was over 55 years of age at the time of death and had no dependent children, the Panel recommends that a sum of US$60,000 be awarded to the surviving spouse.

4. Mental pain and anguish (MPA)

(a) MPA for death

227. Twelve of the thirteen D3 claims include claims for MPA for the death of a spouse, child or parent. In its consideration of claims for MPA, the Panel reviewed the report of the Panel of Experts appointed by the category "C" Panel to review compensation for claims for MPA in the first three categories set by the Governing Council in decision 8, which included situations where a person had died 94/. That report stated that some of the events listed including death:

> "... were grave and severely distressing, and there is well-established scientific evidence that all such events would cause severe mental pain and anguish".

228. All claimants with D3 claims for MPA have checked the appropriate sections of the "D" claim form and provided evidence of the fact of death, the causal link between the invasion and occupation, and of the family relationship. Each claimant submitted an Acceptable Explanatory Statement 95/ describing the circumstances of death. The Panel has accordingly recommended payment of compensation for such claims within the limits prescribed by the Governing Council in its decision 8 and referred to hereafter.

(b) MPA for witnessing the intentional infliction of events leading to death

229. Three of the D3 claims in the first instalment that had MPA claims for death, also included MPA claims for witnessing the intentional infliction of events that led to the death. In each case the claimant's child died.

230. The nature of the act of witnessing the death is such that direct documentary evidence would not be available, and therefore the Panel finds that an Acceptable Explanatory Statement 96/ is sufficient for the claim to be compensable.

231. In one claim, requiring particular consideration where the claimant's child died as a result of a landmine explosion, the claimant did not actually witness the explosion itself which killed his son, but arrived immediately at the scene and saw what it had done to his child. The Panel

is of the view that the term "witnessed the intentional infliction of the events" should be interpreted to encompass the circumstances described.

232. The Panel finds that the circumstances described in the three claims justify the award of compensation for MPA for witnessing the death.

(c) Valuation of MPA

233. Decision 8 establishes ceilings for compensation payable for claims for MPA. Amounts differ depending on the category of MPA claimed, and whether the claim is an individual or a family claim.

234. The ceiling for MPA for death of a spouse, child or parent is US$15,000 for an individual claimant and US$30,000 for a family unit. In the case of MPA for witnessing the events leading to the death, the ceiling is US$2,500 and US$5,000, respectively.

235. In its review of the amounts payable for MPA under decision 8, the Panel of Experts which reviewed compensation for claims for MPA considered that the maximum ceiling amounts provided in decision 8 were generally low. 97/ The Panel is inclined to agree with the Panel of Experts that the ceilings are modest and therefore recommends that the maximum amounts payable under decision 8 should be awarded in each D3 claim for MPA.

236. The Panel determined that where other family members have been listed on the DID.2 page of the claim form, and the claimant has established that there is a claim for MPA which is compensable, then the family amount should be awarded. In all such cases the secretariat will conduct further searches to ensure that no other claim for MPA has been submitted by any other family members.

G. Overlap of D3 claims with claims in categories "B" and "C"

237. As noted above, all claimants with D3 claims also submitted claims in category "B", and all except one submitted claims for loss of support in category "C". The Panel is of the view that the entire death claim should be reviewed (i.e., the claims submitted in categories "B", "C" and "D") and the award should be based upon the evidence in the complete claim file. In respect of claims already decided by the category "B" and "C" Panels, the amounts awarded will be deducted from the amounts awarded in category "D". The same approach referred to in paragraph 84 above will be applied in the future in respect of claims which are still pending before the category "C" Panel.

H. Panel determinations on D3 claims

238. The Panel recommends that claims for medical and burial expenses should be compensated in full as expenses were directly linked to the death and were supported by invoices. However, a claim for a donation made in

memory of the deceased is not compensable as it was too remote and not directly linked to the death.

239. All the claims for loss of support where the deceased was employed and earning an income should be compensated in accordance with the methodology adopted by the Panel as set out above.

240. In the case of claims submitted for loss of support where the deceased had no personal income, lump sum awards have been recommended. The amounts awarded vary depending on the family relationship between the claimant and the deceased, the age of the claimant and the deceased in some cases.

241. In respect of a deceased member of the Kuwaiti armed forces, the Panel is of the view that the deceased was not under the command of the allied forces at the time of death, therefore the exclusion set out in decision 11 does not apply. 98/

242. While the methodology which the Panel has adopted in respect of D3 loss of support claims is based on the demographic characteristics of the D3 claims population, the Panel is mindful of the fact that this methodology will have to be adapted in accordance with the personal circumstances of the claimants whose claims will be included in future instalments of D3 claims.

243. The maximum amounts payable for MPA under decision 8 were recommended for all the D3 claims for MPA for death or for witnessing the events leading to the death.

244. The Panel has instructed the secretariat that amounts awarded in categories "B" and "C" should be deducted from amounts awarded in category "D".

XII. D4 MOTOR VEHICLE CLAIMS

A. Introduction and factual background

245. There are six D4 motor vehicle claims ("D4(MV) claims") in the first instalment with an asserted value of US$298,108.

246. The secretariat estimates that the total number of D4(MV) claims in the category "D" claims population is 2,160 for an asserted total value of approximately US$90 million. In addition, it is likely that motor vehicles used for business purposes will be claimed under the D8/9 business claims.

247. The D4(MV) claims thus represent a small proportion of the expected total number of D4(MV) claims. As noted earlier in this report, the Panel is mindful that in setting precedents for a large number of claims based upon the review and evaluation of a small number of claims it is possible that not all fact situations and issues will have been considered. 99/ If

necessary, modifications to the criteria set out below will be made in relation to appropriate cases in future instalments.

248. The Panel considered the relevant background facts, in particular the evidence of the massive destruction of different kinds of property in Kuwait during the invasion and occupation by Iraq described in chapter II above.

249. There is considerable evidence (including photographic evidence) to indicate that the loss of motor vehicles during the invasion and occupation of Kuwait by Iraq was enormous. As is noted in the Ahtisaari Report:

> "The Kuwaiti vehicle fleet suffered major losses during the period. It is estimated that there were around 800,000 motor vehicles in the country in 1990, of which about 85 per cent were private cars. Approximately two thirds of this asset was reported stolen, looted or vandalized. The loss of public and private vehicles is very apparent." 100/

250. The Farah Report notes that:

> "The mission saw thousands of stripped and damaged cars, many unrepairable, on streets, roads, parking lots and open spaces in Kuwait City and during visits to outlying areas." 101/

251. The Panel reviewed a report dated 20 July 1994 submitted by the Government of Kuwait (the "PAAC Motor Vehicle Report"). 102/ Attached to the PAAC Motor Vehicle Report is a motor vehicle valuation table (the "MVV Table"). The MVV Table sets out the value of a wide variety of various makes and models of motor vehicles in Kuwait as of 1 August 1990.

252. The Panel also reviewed the pertinent sections of the PAAC "D" Cover Report wherein, importantly, it is explained that apart from registration certificates issued by the Traffic Department which are regarded as proof of ownership of a vehicle, as the Department's computer system became operational, it issued a "drop registration certificate" in order to certify deregistration due to the loss or destruction of a motor vehicle as a result of the invasion and occupation of Kuwait by Iraq. 103/

B. Applicable Governing Council decisions

253. Other than the instructions provided to D4(MV) claimants on the "D" claim form, there are no specific Governing Council decisions on point in respect of D4(MV) claims.

C. Category "D" claim form requirements

254. The D4 page of the "D" claim form provides that, in respect of motor vehicles, three types of claims may be made under the following headings: "total loss", "stolen, not recovered" and "repaired". The majority of

claims are for the loss or theft of the motor vehicles. There are no "repair" claims among the D4(MV) claims in the first instalment..

255. The instructions given to D4(MV) claimants read as follows:

> "Attach a statement describing the circumstances of your losses. Also, attach documentary and other appropriate evidence establishing ownership of the vehicles and explain the method of valuation used."

256. The "D" claim form also specifies that the make, model/year, registration number and vehicle identification number must be provided. In respect of establishing the value of the loss, in applicable cases the "cost of repairs, replacement, towing or rental" must be included.

D. Factual description of D4(MV) claims

257. Generally, the Panel found the D4(MV) claims to be well documented. In most cases evidence of residence in Kuwait is clearly demonstrated. In addition, most claimants have, as required by the "D" claim form, described the circumstances of the loss in a statement. In addition to statements, the types of evidence submitted include: import documentation, registration certificates and drop registration certificates. There are no D4(MV) claims in the first instalment in respect of motor vehicles lost in or stolen from Iraq.

E. Article 16 issues and responses

258. No D4(MV) issues were raised in the Article 16 Reports.

F. D4(MV) methodology

259. The Panel having reviewed the D4(MV) claims in the first instalment; the instructions set out on the "D" claim form; the factual background of the D4(MV) claims noted above and in the Background Reports 104/; the applicable Rules; the PAAC Motor Vehicle Report; the MVV Table; and the PAAC "D" Cover Report as well as the methodology adopted by the category "C" Panel 105/, adopts the D4(MV) methodology set out below.

1. Residency in Kuwait or Iraq

260. The Panel considers that generally claimants must be shown to be or to have been residents of Kuwait or Iraq. Any claims by non-residents of Kuwait or Iraq must clearly explain why the vehicle in question was in Kuwait or Iraq.

2. Ownership

261. The Panel notes from the PAAC "D" Cover Report that the following types of documents were acceptable to support ownership: a computer print-out of ownership (also referred to as a registration certificate), a drop registration certificate (which evidences ownership and loss) and a

certificate of import (issued by the Kuwait Traffic Department as proof of legal import into Kuwait). 106/

262. In respect of those who did return to Kuwait after the invasion and occupation, the Panel finds that the following types of evidence may be considered conclusive proof of ownership: a registration certificate of ownership, a drop registration certificate, a certificate of import or original purchase receipts. In respect of those who did not or could not return to Kuwait and therefore were unable to obtain specific proof of ownership or loss, the Panel finds that, in view of the factual background described earlier, the evidentiary standard applicable to category "D" claims could be reasonably met by a claimant furnishing a completed claim form and an Acceptable Explanatory Statement 107/ stating details of ownership, giving full details of the motor vehicle, the circumstances of the loss and why no other documentary evidence is available.

3. Loss

263. The Panel has taken into account the extensive evidence of large scale loss of motor vehicles during the invasion and occupation of Kuwait by Iraq, as described above. The Panel notes, in respect of claims for which a drop registration certificate has been submitted, that the certificate contains a statement indicating that the registration of the vehicle was "dropped" due to the Iraqi aggression. The Panel considers that it is reasonable to accept the "drop registration certificate" as proof of loss in such cases. In other cases, the Panel holds that acceptable proof of ownership and an Acceptable Explanatory Statement 108/ explaining the loss, would justify a presumption that if a vehicle was left in Iraq or Kuwait prior to or during the invasion and occupation and was not found thereafter, it was lost.

264. The Panel asked the secretariat to enquire as to Kuwaiti motor vehicle insurance practice. Specifically, the Panel was concerned that individuals may have been paid by insurance companies in respect of motor vehicle losses incurred during the invasion and occupation.

265. The Government of Kuwait informed the secretariat that as a rule, damage insurance is not purchased in Kuwait and that in any event motor vehicle insurance policies typically contain war exclusion clauses. Copies of standard form war exclusion clauses were provided to the Panel.

4. Causation

266. To be compensable, the loss must be demonstrated to have been "directly" caused by the invasion and occupation of Kuwait by Iraq. For this purpose also, the Panel considers that there is a justifiable presumption that if a vehicle was left in Iraq or Kuwait prior to or during the invasion and occupation, and was lost, then it was lost as a "direct" result of Iraq's invasion and occupation of Kuwait. Again, the

circumstances of the loss must also be explained in a statement, as required by the "D" claim form.

5. Valuation

267. The methodology used by PAAC to formulate the MVV Table is outlined in the PAAC Motor Vehicle Report. While the MVV Table appeared to be comprehensive and reasonable, the Panel considered it desirable to obtain an independent verification of the MVV Table and requested the secretariat to obtain such verification.

268. A well-known international loss adjusting firm conducted a brief review to ascertain whether the MVV Table is reliable. The loss adjusting firm (which is also being employed to assist a panel of Commissioners in another category), was of the opinion that although there were some discrepancies in the MVV Table, in the circumstances it is on the whole adequate.

269. The Panel concluded that in view of this opinion the MVV Table can be relied upon and used for the valuation of D4 motor vehicle losses. 109/

270. Although the "D" claim form instructs claimants to "explain the method of valuation used", the Panel has taken the view that unless the claimant's valuation is the lowest, it is not appropriate to base its valuation on the method used by a claimant.

271. For valuation purposes, the Panel finds that the lowest of three figures should be awarded, namely:

- the amount of loss claimed on the D4 page of the "D" claim form;
- the MVV Table value corresponding to a claimant's motor vehicle; or
- the original cost or value of the vehicle as stated on the D4 page of the claim form.

272. Generally speaking, a claimant should not be awarded more than the claimed amount. If for some reason a value is given, either as the original value or the value of the loss as determined by the claimant which is lower than the MVV Table, the lower figure should be decisive. The claimant may be aware of a feature or flaw in the vehicle that reduces its value or may have acquired the vehicle at a price below market cost.

G. Panel determinations on D4(MV) claims

273. In respect of those who could not return to Kuwait after the invasion and occupation by Iraq, as might be expected, their claims were less well documented. Nevertheless, in addition to an Acceptable Explanatory Statement, 110/ such claims included other documents such as export receipts and accordingly the Panel has recommended an award of compensation pursuant to the valuation criteria set out above.

274. Claimants who returned to Kuwait after the invasion and occupation were able to attach drop registration certificates, often in addition to purchase receipts, photographs and an Acceptable Explanatory Statement. 111/ Such claims were approved and have been recommended for award of compensation pursuant to the valuation criteria set out above.

XIII. D6 LOSS OF INCOME CLAIMS

A. Introduction and factual background

275. There are 43 D6 claims for loss of income, unpaid salaries or support ("D6 claims") in the first instalment with an asserted value of approximately US$2.2 million.

276. The secretariat estimates that the total approximate number of D6 claims in the category "D" claims population is 2,800 for an asserted amount of approximately US$526 million. Therefore, the D6 claims constitute one of the largest (both in terms of number of claims and asserted value) loss types in the category "D" claims population.

277. The Panel considered the relevant background facts noted in chapter II above. The Panel further notes that there were a large number of expatriate workers in Kuwait and Iraq prior to the invasion. In Kuwait, they provided over 50 per cent of the country's labour force. The Panel also notes that real wages and salaries in Kuwait were amongst the highest in the world. While some expatriates only stayed for a few years, many stayed for much longer periods and had a reasonable expectation of spending their entire working life in Kuwait. 112/

278. As noted above in chapter IX, a very large percentage of the Kuwaiti and expatriate population was forced to flee Kuwait. Similarly, a very large number of expatriates resident in Iraq were also forced to flee. All those who fled were consequently forced to abandon their employment.

B. Applicable Governing Council decisions

279. The guidance that the Governing Council has provided in respect of the D6 claims is contained in decisions 3, 7 and 8.

280. Decision 7, paragraph 5 provides, in respect of category "D" claims, that: "Claims may be submitted under this category for the loss of earnings..."

281. Decision 3 provides that a claimant is entitled to make a claim for mental pain and anguish where:

> "[t]he individual was deprived of all economic resources, such as to threaten seriously his or her survival and that of his or her spouse, children or parents, in cases where assistance from his or her Government or other sources has not been provided".

282. Decision 8 specifies the compensation payable to successful D6 MPA claimants. In the case of an individual the ceiling is US$2,500 and the ceiling per family unit is US$5,000.

C. Category "D" claim form requirements

283. The D6 page of the category "D" claim form is entitled "Loss of Income, Unpaid Salaries or Support".

284. To begin with, the category "D" claim form requires the claimant to furnish particulars of his employment history prior to 2 August 1990. The claimant must indicate whether there was an employment contract prior to 2 August 1990, supply the name and address of the employer, specify the length of time employed prior to 2 August 1990 and the salary prior to that date. In respect of salary, the claim form further states: "Attach documentary and other appropriate documentary evidence such as copies of pay slips and support payments."

285. The claimant is also required to indicate whether he or she has resumed work in Iraq or Kuwait following the liberation of Kuwait, and if so, when work was resumed, the present salary, and the name and address of the employer. Where the claimant has not returned to Iraq or Kuwait he or she is required to state the reason.

286. The claimant is required to indicate the type of loss being claimed (i.e., "Wages or Salary", "Support" or "Other"), the currency of the loss and the amount of the loss.

287. The general instructions given to D6 claimants read as follows:

> "Attach a statement describing your damages (including how you calculated the damages) and documentary and other appropriate evidence demonstrating your entitlement to recovery."

288. The D6 page of the "D" claim form also provides that a claim may be made for MPA. The instructions read as follows:

> "Claims for mental pain and anguish resulting from the deprivation of all of your economic resources can be made only if you were deprived of all economic resources such as to threaten seriously your survival and that of your spouse, children or parents, in cases where assistance from your Government or other sources has not been provided. Such claims must be substantiated by documentary and other appropriate evidence."

289. The claimant is required to tick a box if an MPA claim is being made and "attach appropriate evidence".

D. Factual description of D6 claims

290. Under "Wages or Salary", claimants are claiming for a variety of losses. Some have claimed for losses representing the remainder of their employment contracts; some have claimed for longer periods on the grounds that their contracts were for an indeterminate term; some are claiming for losses up until they were able to find new employment or were re-employed; and some are claiming for the difference between their old and new salaries. Some claimants indicate that they were able to find alternative employment relatively quickly after fleeing from Kuwait or Iraq and have provided details of their subsequent income levels. 113/

291. The employment contracts reviewed by the Panel vary widely. Some are fixed term, others have no term (i.e., they are open ended), and some claimants had no written contracts. Many claimants were on short term contracts or employed "at will" but had worked in Kuwait or Iraq for many years. It is important to note that a number of claimants have claimed for large amounts since they had an expectation of long term employment and state that they have been unable to find similar jobs.

292. The Panel notes that many of the D6 claimants are highly skilled expatriate professionals who were well paid and had long term career prospects in Kuwait or Iraq. 114/

293. Claimants not only claim for loss of wages and salary, but also for a wide range of employment related benefits, which include: cost of living allowance, travel allowance, hardship premium, unused vacation pay, home leave, pension contributions, overtime pay, end of year bonuses, profit sharing, family allowance, rent subsidies, car allowance, health care, education allowance, end of term indemnity payments and relocation payments.

294. The Panel found that many claimants divided their claims between C6 and D6 by, for example, claiming for their salary under C6 and various benefits such as education allowance or housing subsidy under D6. The Panel faced an added difficulty in that many such C6 claims have not yet been resolved. In some cases identical claims have been filed under categories "C" and "D" and the claimant has simply asserted that the "first" US$100,000 is to be considered under category "C" without specifying what exactly is being claimed under each category. Of the 43 D6 claims in the first instalment, 27 have a corresponding C6 claim.

295. D6 claimants have submitted varying types of evidence in support of their claims. With respect to evidence proving employment, the claimants have submitted copies of their employment contracts indicating their date of appointment, duration of contract, basic salary and, where applicable, other benefits and entitlements; and others have submitted copies of letters of offer of employment, letters of promotion or renewal of contracts. In most of these cases the documents clearly demonstrate that the claimant was employed in Iraq or Kuwait and state the period of

employment and the monthly salary. Still other claimants have submitted very detailed statements explaining what they were doing in Iraq or Kuwait, their salaries and a detailed explanation of their losses.

296. Some claims present unique issues. For example, one claimant in the first instalment is claiming a percentage of the spouse's salary where the claimant's spouse is an Iraqi national. Another claimant, an employee of an Iraqi state-owned bank based in London, is claiming for loss of income as a result of being laid off following the suspension of the bank's activities in the United Kingdom.

297. Under "Support" and "Other", claimants seem to have been confused by the headings (e.g., they claimed for employment benefits under "Support"), and others claimed for their salary under "Wages and Salary" and claimed their employment related benefits under "Other". All such claims have been evaluated as "loss of income" claims by the Panel.

298. There are no D6 MPA claims in the first instalment.

E. Article 16 issues and responses

299. The Panel considers that the responses of Governments to the issues raised in the Article 16 Reports, and in particular the responses of the Government of Iraq, are of particular importance.

300. Two issues were raised in the Article 16 Reports that pertain to the D6 Claims. The first issue is in respect of the compensability of certain employment related losses, such as for work performed but not yet paid, for the unexpired period of time of an employment contract, for lost income until a claimant could or did find employment, for the difference between salary under an employment contract prior to the invasion and occupation and a lower salary under a subsequent contract of employment, and for various employment benefits such as housing allowances, bonuses and termination indemnities. The second issue is in respect of the extent to which the C6 methodology adopted by the category "C" Panel (i.e. a multiplier to be applied to monthly income) ought to be applied to the D6 claims. 115/ Several Governments, including the Government of Iraq, responded.

301. Generally, Governments commented on the first issue by saying that, subject to a duty to mitigate, all damages in respect of which a causal connection exists to the Iraqi invasion and occupation are compensable. One Government stated that any consequence of the termination of employment contracts are indirect damages and therefore not compensable.

302. In respect of the second issue, one Government stated that since loss of income claims in categories "C" and "D" have much in common, in the interests of swift and efficient processing, the use of techniques similar to those adopted by the category "C" Panel is justified in respect of D6 claims.

F. D6 methodology

303. The Panel, having reviewed the D6 claims in the first instalment; the responses of various Governments (including the Government of Iraq) to the issues raised in the Article 16 Reports as set out above; the applicable Governing Council decisions noted above; a report prepared by an international labour law expert (the "Employment Law Report") 116/, as well as the methodology adopted by the category "C" Panel, adopts the D6 methodology set out below.

1. Proof of fact of employment

304. A claimant must first establish the fact of his or her employment. This can be demonstrated by an employment contract, letter of employment, employee identification card, work permit, or similar documents. In the alternative, in view of the factual background described earlier in this report, the Panel considers that the evidentiary standard applicable to category "D" claims, with regard to the fact of employment, could also be reasonably met by a claimant furnishing an Acceptable Explanatory Statement. 117/

2. Proof of causal link to the invasion and occupation

305. In accordance with Security Council resolution 687 (1991) and Governing Council decision 7, a claimant must demonstrate that the losses claimed were a "direct" result of the invasion and occupation of Kuwait. The causal link between the loss and the invasion must be explained by the claimant in a statement (as required by the "D" claim form).

306. The Panel considered the issue of whether claimants working in third countries (e.g., employees of overseas branch offices of Kuwaiti or Iraqi companies) could be considered to have suffered a direct employment-related loss as a result of Iraq's invasion and occupation of Kuwait. The Panel holds that if a loss is shown to be "direct" it is compensable, regardless of the location of the loss. For example, a claim has been made by the employee of the London branch office of an Iraqi state-owned bank, which ceased conducting business after the invasion.

3. Valuation of loss

307. While there are a number of ways in which the D6 claims can be valued, the Panel considered at length two broad methodologies that could be used.

308. The first is to analyze the frustrated employment contract, determine the applicable law, and analyze the claimant's entitlements under such contract in accordance with the applicable law.

309. The second is to base the valuation on a numerical multiplier applied to a claimant's monthly income.

310. The Panel finds that the first method would be impractical and unworkable in respect of 2,800 widely different claims. The determination of the precise terms and conditions of each contract of employment, the ascertainment of the governing law and the establishment of the relevant provisions of that law would pose a task of vast proportions. Moreover, the enormous variety of benefits being claimed renders such methodology impractical. Further, such an approach is likely to lead to inconsistent results. Such methodology would also be inconsistent with the methodology adopted by the category "C" Panel, which, bearing in mind the fact that many claimants have divided up their claims between C6 and D6 in different ways, would make such an approach rather problematic.

311. The Panel therefore reviewed to what extent a methodology such as the one used by the category "C" Panel, i.e. a multiplier applied to a claimant's monthly salary, could form the basis of the valuation of the D6 claims. 118/

312. The Panel has had the benefit of being able to review the background information gathered by "C" Panel about the labour force in both Iraq and Kuwait, general terms and conditions of employment in the region and the impact of the invasion on the economic life in Kuwait. 119/

313. The Panel also notes that in arriving at its conclusions the category "C" Panel considered a range of factors, including various international standards, applicable Iraqi and Kuwaiti legislation and various other factors such as benefits and allowances and, most importantly, the duty to mitigate losses. Taking account of the large number of C6 claims (estimated at 360,000), the mandate to review the claims on an expedited basis, the evidentiary standard applicable to category "C" and the large number of countries that submitted C6 claims (over 90), the category "C" Panel, in determining what would be the "reasonable" damages payable to claimants for wage and salary losses, decided that a multiplier of seven be applied to the claimant's asserted monthly salary, wage or income (as the case may be). 120/

314. The category "C" Panel thereafter awarded the lesser of the result of the multiplier of seven applied to monthly income and the actual total amount claimed. 121/

315. For the reasons given by the category "C" Panel, with which this Panel concurs, and those outlined herein, the Panel finds that the adoption of a multiplier to be applied to a claimant's monthly income is fair, leads to consistent results, and is a practical methodology to apply to 2,800 individual D6 claims. Indeed, given the large number of D6 claims that have a related C6 claim, the adoption of a multiplier would seem to be the only methodology that will lead to consistent results for claimants who have claimed part of their loss of income under C6 and part under D6.

316. The claims considered by the Panel differ widely in respect of the profession of the claimant, calculation of income, types of benefits

claimed and the ability of the claimant to mitigate damages. A multiplier, by "bundling" the various components of a loss of income claim together, produces consistent results. The Panel is of the view that it is not realistically possible to develop more specific criteria that would produce consistent results given the diverse nature and large number of D6 claims.

317. The Panel emphasizes that, consistent with the criteria established herein with respect to other loss types, to succeed, a D6 claim must meet the evidentiary burden applicable to category "D" claims. For this purpose, all D6 claims are to be individually reviewed.

318. In reaching the conclusion that a multiplier is to be applied to a claimant's monthly income, the Panel took particular note of the Employment Law Report, which analyses the nature of employment relationships, applicable laws, elements of remuneration and possible entitlements. It also outlines the large number of possible benefits payable, which have been listed above, various payments associated with the termination of employment, such as pay in lieu of notice, termination indemnities, accumulated holiday and vested interests in pensions, as well as examines recent international experience of mass employment claims. 122/

319. Many claimants who have filed D6 claims seek recovery for the entire amount due until the end of the fixed term contract. The Employment Law Report notes that there are three broad approaches to such claims under various legal systems. First, an unconditional right to recover the full amount representing the remainder of the contract; second, to admit the first approach but also to impose a ceiling on the amount recoverable; and third to treat such frustrated employment contracts as ones where damages for breach are due, which damages could be more or less than the remainder due under the contract. 123/

320. The Panel is of the view that, upon losing employment due to the invasion and occupation, claimants had a duty to mitigate their losses as quickly as reasonably possible; therefore awards for long periods of time based on fixed term employment contracts are not reasonable.

321. Bearing in mind the claimant's duty to mitigate together with the other factors noted above, such as claims for many different types of benefits, termination entitlements and for various periods of time that are either remaining under a fixed term employment contract or having worked in Kuwait or Iraq for a long period thereby raising an expectation of continued future employment, the Panel adopts a multiplier as set out below.

(a) Calculation of multiplier

322. In considering the multiplier to be applied to a claimant's monthly income, the Panel took into account the fact that the category "C" Panel adopted a multiplier of 7 for reasons with which the Panel generally concurs.

323. Consistent with the methodology adopted in respect of C6 claims, the Panel therefore determines that all category "D" claimants who meet the evidentiary burden applicable to category "D" claims shall receive compensation on the basis of a minimum multiplier of 7.

324. However, given the profile of the D6 claimants, and in particular given the fact that many claimants were professionals on fixed term contracts or in stable long term employment arrangements who therefore could reasonably expect employment well into the future, the Panel is of the view that under certain circumstances and where sufficient evidence is provided, a higher multiplier may be awarded. The Panel finds that, taking account of all the circumstances in relation to the D6 claims, and in particular a claimant's duty to mitigate his or her losses by finding alternative employment within one year of the invasion and occupation, a multiplier of up to a "cap" of 12 is reasonable.

325. The Panel is of the view that claimants on fixed term contracts ought to be compensated for the remaining period under the contract, up to a maximum of one year. The Panel finds that such claimants, who are therefore claiming more than they would receive from the application of a multiplier of 7, are entitled to an addition of 1 to the multiplier for each year or partial year of a fixed term contract, up to 5 for a maximum total of 12.

326. In respect of written contracts without a termination date, 124/ the Panel considers that an addition of one (1) to the multiplier is reasonable.

327. Upon reviewing the D6 first instalment claims the Panel noted that many claimants were employed for long periods of time prior to the invasion and had a reasonable expectation to be employed into the future, sometimes until retirement. However, many such claimants either had short term contracts that were "rolled over" every year or were employed "at will".

328. In view of the reasonable expectation such claimants had of employment well into the future, on the one hand, and consistent with the duty to mitigate losses, on the other hand, the Panel finds that such claimants may receive an addition of 1 to their minimum multiplier of 7 for the first complete 3 year period that they worked for the same employer, as well as an addition of 1 for each additional 3 year period and if there is a remainder of less than 3 years, an addition of 1 for the remainder. 125/

329. Thus claimants may receive additions to the multiplier for each year or partial year of a fixed term contract ("going forward"), an addition of 1 in the case of an open-ended fixed term contract (as explained above in paragraph 326), and may receive additions to the multiplier if they have a record of employment with the same employer for 3 years or more ("going back") (as explained above in paragraph 328). A claimant may receive additions to the multiplier both going forward and going back. However, the multiplier is always capped at 12.

330. In all cases, compensation is only awarded if the evidentiary burden applicable to category "D" claims is satisfied. The Panel finds that claimants must provide the following documentary evidence:

(a) a written employment contract; or
(b) a letter from an employer; or
(c) justifying pay slips; or
(d) an Acceptable Explanatory Statement, 126/ which explains the terms and conditions of employment.

(b) Calculation of monthly income

331. Having decided to adopt a multiplier, the Panel next considered how to calculate the monthly income in respect of which the multiplier is to be applied.

332. After reviewing the D6 first instalment claims the Panel noted the apparent difficulty in calculating a claimant's monthly income. Claimants have claimed for items as diverse as bonuses, end of term indemnities, benefits (school fees, medical coverage, motor vehicles etc.), and so on. Some have included benefits in their calculation of monthly income, others have not.

333. Therefore the Panel finds that the multiplier is to be applied to the claimant's asserted monthly income, i.e., as stated on the claim form. Such amount must of course be supported by documentation in accordance with the evidentiary standard applicable to category "D" claims. If only part of the monthly income is supported by the evidence in the claim file, then the multiplier is applied to the amount of monthly income that is supported by such evidence. Only deductions from a claimant's asserted monthly income can be made, not additions.

334. If no income has been asserted by the claimant, the Panel will determine a monthly income on the basis of payments which are quantifiable and which the Panel considers should be included. 127/

(c) C6/D6 overlap

335. There are several issues in respect of C6/D6 overlap claims. In respect of C6 claims that are still pending, the Panel is of the view that the most efficient way would be for it to review the entire loss of income claim (i.e., in both C6 and D6) and make an award based upon the evidence in the complete claim file provided the category "D" claims evidentiary standard has been met. Once the category "C" Panel has decided the claim applying the governing evidentiary standard for category "C" claims any amount awarded by the category "C" Panel must be deducted from the D6 award.

336. In cases where claimants have split the claim by, for example, claiming loss of salary under C6 and loss of certain benefits under D6, the

multiplier is to be applied to the asserted monthly income on the D6 page of the claim form and a D6 award made accordingly. Any C6 award is to be deducted from the D6 award.

4. "Support" claims

337. As noted above, all "support" claims have been evaluated as "loss of income" claims.

5. "Other" employment related claims

338. The claims made under the heading "Other" are for end-of-service indemnities, employment related benefits, etc., which were considered by the Panel under the overall "loss of income" claimed and regarded as covered by the application of the multiplier.

6. Mental pain and anguish

339. There are no D6(MPA) claims in the first instalment. The Panel will establish criteria in respect of such claims as and when necessary when dealing with future instalments.

G. Panel determinations on D6 claims

340. The Panel found that the application of the methodology set out above to the D6 first instalment claims made it possible to deal with such claims in an efficient and reasonable manner. On average, a multiplier of just over 10 was awarded to claimants. Ten of the 43 D6 first instalment claims were awarded the maximum multiplier of twelve (12). However, the awards generated by the multiplier are generally substantially lower than the amount claimed. This is because many claimants claimed the full amount due under fixed term contracts which had several years left. As noted above, in view of the duty to mitigate losses, the Panel considers that the awards recommended with respect to the D6 claims are reasonable.

341. Any claims that did not meet the evidentiary criteria set out above were rejected. More specifically, one claim was rejected as it is in respect of a dispute with the employer that occurred prior to the invasion and occupation of Kuwait. A claim by a spouse of an Iraqi national based on such Iraqi national's income was rejected since Iraqi nationals are precluded from filing claims. 128/ In another case, the claimant had already been compensated by the employer for loss of income during the invasion and occupation of Kuwait.

XIV. D10 PAYMENTS/RELIEF CLAIMS

A. Introduction and factual background

342. One of the claims in the first instalment is for losses arising from payments made or relief provided to others ("D10 claims"). The Panel felt it must be extremely cautious in setting criteria based upon only one claim. However, to assist the Panel, the secretariat reviewed a number of D10 claims not in the first instalment and summarized them for the Panel. The Panel was therefore able to consider the facts of such D10 claims when establishing the criteria set out below.

343. The secretariat estimates that the total number of D10 claims in the category "D" claims population is 204 for an asserted amount of approximately US$33 million.

344. The Panel considered a number of relevant background facts which are described in chapter II above, in particular the estimated number of foreigners in Iraq and Kuwait and the departure patterns identified amongst the departees, which have been noted by other Panels and in the Background Reports.

B. Applicable Governing Council decisions

345. Governing Council decision 7 paragraph 7 provides as follows:

"...In addition, these payments are available to reimburse payments made or relief provided by individuals to others - for example, to employees or to others pursuant to contractual obligations - for losses covered by any of the criteria adopted by the Council."

346. There is no equivalent loss type under category "C".

C. Category "D" claim form requirements

347. The D10 page of the "D" claim form provides that a claim can be made for "Losses Arising From Payments Made Or Relief Provided to Others".

348. The instructions given to D10 claimants read as follows:

> "Attach a statement describing the reasons, the circumstances and the amounts of payments you made or relief you provided to others. Include documentary and other appropriate evidence as well as, if applicable, evidence showing the obligation for the payment, the amount and the recipient of the payment or relief (e.g., the contract in the event you had a contractual obligation to make payments). Explain the method of valuation for the relief".

D. Article 16 issues and responses

349. No issues have been raised in the Article 16 Reports in respect of D10 claims. However, as noted below, issues have been raised in the Article 16 Reports in respect of similar claims under categories "E" and "F".

E. Category "E" and "F" claims

350. The category "E" and "F" claim forms provide for an identical loss type whereby corporations, in the case of category "E", and Governments and international organizations, in the case of category "F", may claim damages for losses arising from "payment or relief to others".

351. Most of the claims falling under this loss type, in both category "E" and "F", relate to evacuation. In category "E", corporations are seeking compensation for costs allegedly incurred in repatriating their employees to their home countries. In category "F", claims have been filed by Governments seeking compensation for the evacuation of their embassy staff, their nationals and, in some cases, nationals of other countries from Iraq or Kuwait following the invasion. The issue as to whether the costs of repatriation are compensable in these categories of claims was raised in several Article 16 Reports. 129/ Several Governments responded, including the Government of Iraq.

352. Almost all Governments stated that the Commission has the jurisdiction to award compensation for losses arising from the evacuation and repatriation of employees or nationals as the case may be.

353. One Government responded stating that claims for "payment or relief to others" are not compensable since the corporations/Governments concerned in any event had an obligation to repatriate employees.

F. Factual description of D10 claims

354. The D10 claim in the first instalment is in respect of financial assistance provided to the claimant's family. A review of a number of D10 claims not in the first instalment indicates that claimants have interpreted this loss page in different ways. One claimant used the D10 loss page to claim for the university fees of his children in the United States. According to him, because of the invasion and subsequent occupation, his children could no longer attend university in Kuwait and therefore they transferred to a university in the United States. Yet another claimant has used this loss page to claim for the financial loss he suffered when, following the invasion, he exchanged Kuwaiti dinars at a very low exchange rate in Cairo.

355. One claim that properly falls under this loss type but which is not in the first instalment is that of a Jordanian national who during the occupation assisted several foreigners, who were forced to hide. As

evidence in support of his claim the claimant provided written statements by these individuals attesting to his assistance during the occupation. The statements described how the claimant had, at risk to his own life, obtained food and beverages for these people and had also passed on communications between the individuals and their respective embassies and consulates. In addition, the claimant submitted a copy of a newspaper article showing a picture of the claimant and his family which also describes the claimant's exploits. Finally, the claimant provided copies of receipts proving that during the occupation he purchased large quantities of beverages.

G. Proposed D10 methodology

356. The Panel having reviewed the D10 claims in the first instalment; the responses summarized above of various Governments (including the Government of Iraq) to the issues raised in the Article 16 Reports in respect of the category "E" and "F" claims; the instructions set out on the D10 page of the "D" claim form; the Background Reports noted above; the applicable Governing Council decisions noted above; and the summaries of D10 claims not in the first instalment, adopts the D10 methodology set out below.

357. The Panel notes that since there is only one D10 claim in the first instalment the methodology being adopted may have to be modified in the future as more D10 claims are reviewed and more issues are raised.

358. According to the instructions on the D10 page of the claim form, two types of claims can be filed under this loss type; those arising out of payments made or relief provided privately and those in the course of business. Since there were no claims in the first instalment falling into the latter category (i.e., those arising out of business) the Panel did not adopt a methodology but noted that it is likely that the criteria for such claims will not differ substantially from those set out below in respect of relief provided privately.

1. Proof of payment or relief

359. The Panel determines that a claimant must demonstrate that he or she made payments to or provided relief to another individual or other individuals. The claimant must submit evidence of such payments or proof that such relief was provided (e.g., a statement by the recipient of such payments or relief, or receipts for purchases). The Panel holds that, in view of the factual background described earlier, the evidentiary standard applicable to category "D" claims could be reasonably met by a claimant furnishing an Acceptable Explanatory Statement 130/ identifying the recipient, amount and circumstances of the payment or relief.

2. Causal relationship to the invasion of Kuwait

360. The Panel took the view that in accordance with Security Council resolution 687 and Governing Council decision 7, a claimant must

demonstrate that the losses claimed were a "direct" result of the invasion and occupation of Kuwait. In other words, for the claim to be compensable the claimant must show that the payments were made or the relief was provided under circumstances that are directly related to the invasion and occupation of Kuwait by Iraq.

361. In determining the "directness" of the payments made or the relief provided to the invasion and occupation of Kuwait, the Panel distinguishes between payments that are of a "temporary and extraordinary" nature as opposed to those of an "on-going ordinary living" nature. The Panel holds that those payments that fall into the former category can be said to be directly related to the invasion. This is consistent with the Panel's findings with regard to departure costs for losses under D1(Money)(see paragraph 128 above).

3. Valuation

362. The Panel determined that a claimant is entitled only to the amount supported by appropriate evidence.

H. Panel determinations on D10 claims

363. For the D10 claim in the first instalment, approximately half of the claimed amount is recommended for compensation which is the amount supported by appropriate documentary evidence.

XV. D(OTHER) CLAIMS

A. Introduction and factual background

364. There are six miscellaneous claims in the first instalment ("D(Other) claims").

365. The secretariat estimates that the total number of D(Other) claims in the category "D" claims population is 871 for an asserted amount of approximately US$354,494,723.

366. In dealing with the miscellaneous claims, the Panel took account of the relevant background facts set out in chapter II above.

B. Applicable Governing Council decisions

367. There are no specific Governing Council decisions in respect of the D(Other) claims.

368. However, it is pertinent to repeat that paragraph 6 of decision 7 provides as follows:

"These payments are available with respect to any direct loss, damage, or injury (including death) to individuals as a result of Iraq's unlawful invasion and occupation of Kuwait. . ." [Emphasis added.]

C. Category "D" claim form requirements

369. The DS.1 page of the "D" claim form entitled "Summary of Losses Claimed" allows claimants to summarize their entire category "D" claim. The DS.1 page also provides that claimants may claim for "Any Other Damages Not Covered by the Above", i.e. D(Other).

370. The general instructions given to D(Other) claimants read as follows:

"Attach a statement providing details of what happened, a description of damages, and total value of loss, as well as documentary and other appropriate evidence for each element of such loss".

D. Factual description of D(Other) claims

371. The six D(Other) claims, which are briefly summarized below, are diverse.

372. Three claimants, who were working for the same bank, state that they and the bank for which they worked were identified by a Government as "front companies and agents" for Iraq and were referred to as "specially designated nationals". All three claimants deny the accusation made by such Government and stress that their reputations as well-known bankers and economists have been damaged and that, as a result of these unfounded accusations, they have lost professional opportunities as well as the right to travel to such country. In virtually identical claims, all three are claiming for US$1 million compensation as a result of damage to "their honour and trustworthiness". Two of the claimants are, in addition, claiming for US$1,440,000 compensation in respect of the remaining years until retirement. All claimants provide detailed statements as well as press releases and personal documents to attest to their honour and professional standing.

373. One D(Other) claimant, who was held hostage in Iraq, is claiming for reimbursement of the expenses incurred by his sister when she travelled to Iraq and attempted to secure his release. The claimant provides a detailed list of all her expenses incurred which amount to US$1,924. A copy of the sister's passport showing the visas obtained is also attached.

374. One D(Other) claimant is seeking the sum of US$692,041 in damages in respect of "compensation against defamation, the murderous attempts of terrorists". The claim is not very clear. However, it would appear that the claimant is seeking compensation as a result of an inability to pursue a medical legal action. The claimant states that she could not attach any

evidence in support of her claim since all documents were lost as a result of the invasion.

375. Finally, one D(Other) claimant is claiming in his capacity as creditor/mortgagee for the balance of a loan he made to a debtor/mortgagor in Kuwait prior to the invasion and occupation in the sum of US$1,211,072. The claimant explains that the debtor died after the invasion and occupation and that the latter's heirs sold the mortgaged house to repay the loan but only realized US$657,439. The amount being claimed would appear to be the difference between the amount loaned and the amount received together with the interest that had accrued. In support of his claim the claimant submitted various loan documents.

E. Article 16 issues and responses

376. One single issue pertaining to the D(Other) claims was raised by the Executive Secretary. This issue is in respect of the three claims filed by the bankers/economists for the alleged damage to their career as a result of their name and the name of their employer having been included in a list established by a Government, identifying the bank and the claimants as front agents for Iraq. 131/

377. Two Governments responded to this issue. One Government stated that the compilation and publication of this list was a necessary and integral part of implementing the United Nations approved sanctions. Therefore, these losses result from the trade embargo and related measures against Iraq and as such the claimants are not eligible for compensation. Another Government stated that the matter raised was a consequence of the measures taken by such Government to implement the resolutions of the Security Council. Hence, this issue is directly connected to the impact of the trade embargo imposed on Iraq but is unrelated to the direct effects of Iraq's invasion and occupation of Kuwait. Since the loss being claimed is indirect it is not compensable.

F. Panel determinations on D(Other) claims

378. As the D(Other) claims are very different from each other, it is not possible to establish one methodology for all the claims. The Panel reviewed each claim individually to ascertain whether the loss or damage being claimed was incurred as a direct result of the Iraqi invasion and occupation of Kuwait, whether the evidentiary standard applicable to category "D" claims has been met, and, if so, the value of the loss.

379. The Panel finds that five claimants failed to establish that their loss or damage was a direct result of the invasion and occupation of Kuwait. Therefore, the Panel does not recommend compensation in respect of these claims.

380. In one case, (see paragraph 373 above), the Panel considers that the directness requirement has been satisfactorily demonstrated. However, the

Panel notes that technically the losses were incurred by the claimant's sister. Rather than insist upon the claim being re-filed by the sister, the Panel instructs the secretariat to inform the Government concerned that the claimant is to be instructed to pay his sister the full amount awarded.

XVI. RECOMMENDATIONS

381. Based upon the findings and determinations noted in this report, the Panel's recommendations are set out below.

A. Awards by consolidated claims

382. Annex II lists the recommended awards of the Panel for each country and international organization included in the first instalment. Annex II also lists claims deferred and claims to be reported separately. Each Government and international organization will be provided with a confidential list containing the individual recommendations made in respect of its claimants.

B. Interest

383. The Panel recommends that interest be awarded on the claims included in this first instalment of category "D" claims as of 2 August 1990. 132/

C. Submission through the Executive Secretary to the Governing Council

384. The Panel respectfully submits this report through the Executive Secretary to the Governing Council pursuant to article 38(e) of the Rules.

Geneva, 6 October 1997

(Signed) R.K.P. Shankardass
Chairman

(Signed) H.M. Joko-Smart
Commissioner

(Signed) C. Pryles
Commissioner

Notes

1/ Decision 10, (S/AC.26/1992/10). Article 38(e) of the Rules reads as follows:

"Each panel will report in writing through the Executive Secretary to the Governing Council on the claims received and the amount recommended to be awarded for each claimant. Each report will briefly explain the reasons for the recommendations."

2/ Article 35(2)(c) of the Rules.

3/ All statistics noted herein are preliminary as a computerized database of category "D" claims is not yet available as of the date hereof.

4/ "The Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damages up to US$100,000 (Category "C" Claims)" (S/AC.26/1994/3 and Corr.1), 21 December 1994 (the "First 'C' Report"), p. 23.

5/ Article 32(1) of the Rules reads as follows:

"Following the appointment of the Commissioners by the Governing Council, the Executive Secretary will submit to panels of Commissioners the single claims or categories of claims assigned to each of them together with the related documentation, containing the results of the preliminary assessment made by the Secretariat and any other information deemed to be useful for the work of the Commissioners, as well as the additional information and views submitted in accordance with Article 16."

6/ The Background Reports include the following United Nations reports:

(a) "Report to the Secretary-General on Humanitarian needs in Kuwait in the immediate post-crisis environment by a mission to the area led by Mr. Martti Ahtisaari, Under-Secretary General for administration and management" (S/22409)(the "Ahtisaari Report");

(b) "Report to the Secretary-General by a United Nations mission, led by Mr. Abdulrahim A. Farah, former Under-Secretary General, assessing the scope and nature of damage inflicted on Kuwait's infrastructure during the Iraqi occupation of the country from 2 August 1990 to 27 February 1991" (S/22535)(the "Farah Report");

(c) "Interim Report to the Secretary-General by the United Nations mission led by Mr. Abdulrahim A. Farah, former Under-Secretary General, assessing the losses of life incurred during the Iraqi occupation of Kuwait as well as Iraqi practices against the civilian population in Kuwait" (S/22536) (the "Interim Farah Report");

(d) "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, progress report submitted by Mr. Theo van Boven, Special Rapporteur" (E/CN.4/Sub.2/1991/7);

(e) "Report on the situation of human rights in Kuwait under Iraqi occupation, prepared by Mr. Walter Kälin, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1991/67" (E/CN.4/1992/26) (the "Kälin Report");

(f) "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final Report submitted by Mr. Theo van Boven, Special Rapporteur" (E/CN.4/Sub.2/1993/8).

The Background Reports also include the following Commissioner Panel reports:

(a) "Recommendations made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims)" (S/AC.26/1994/1), 26 May 1994 (the "First "B" Report"); and

(b) The First "C" Report (see note 4 above).

7/ (S/22409), paras. 9-10.

8/ Ibid., para. 41.

9/ See note 6 above.

10/ (S/22535), para. 533.

11/ Ibid., para. 364.

12/ See note 6 above.

13/ (S/22536), para. 20.

14/ (E/CN.4/1992/26), see note 6 above.

15/ (E/CN.4/1992/26), paras. 79-92.

16/ Ibid., para. 100.

17/ Ibid., para. 125.

18/ (S/22535), p. 70.

19/ (E/CN.4/1992/26), paras. 190 and 192.

20/ Ibid., paras. 141 and 189.

21/ Article 38(d) of the Rules reads as follows:

" Unusually large or complex claims may receive detailed review, as appropriate. If so, the panel considering such a claim may, in its discretion, ask for additional written submissions and hold oral proceedings. In such a case, the individual, corporation, Government, international organization or other entity making the claim may present the case directly to the panel, and may be assisted by an attorney or other representative of choice. The panel will complete its review of the case and report in writing through the Executive Secretary its recommendations to the Governing Council within twelve months of the date the claim was submitted to the panel."

22/ The Panel also reviewed a comprehensive cover report on category "D" claims submitted by the Government of Kuwait (Public Authority for Assessment of Compensation for Damages Resulting from Iraqi Aggression), "Covering Report for claims in Category D, submitted to the United Nations Compensation Commission by the Government of the State of Kuwait", March 1996 (hereinafter called the "PAAC 'D' Cover Report").

23/ In paragraph 3, decision 15 re-emphasizes that there are two essential elements to admissible losses: "such losses must be the result of Iraq's unlawful invasion and occupation of Kuwait" and "the causal link must be direct".

24/ Lady Hazel Fox Q.C., "Reparations and state responsibility: Claims against Iraq arising out of the invasion and occupation of Kuwait", in: The Gulf War 1990-91 in International and English Law, (London, P. Rowe, ed., 1993), p. 261 et seq., at pp. 275-276.

25/ B. Cheng, General Principles of Law as Applied by International Courts and Tribunals, (London, Stevens & Sons, 1953), (reprinted by Grotius Publications, 1987), p. 243.

26/ E. Riedel, "Damages", in: Encyclopedia of Public International Law, (R. Bernhardt, ed., 1987), vol. V, p. 68 et seq., at p. 70. See also the First "C" Report, pp. 19-21.

27/ Decision 1 (S/AC.26/1991/1); decision 3 (S/AC.26/1991/3) and decision 8 (S/AC.26/1992/8).

28/ Cf. decision 1, para. 14, provides with respect to category "C" claims that:

> "These payments are available with respect to death or personal injury, or losses of income, support, housing or personal property, or medical expenses or costs of departure, as a result of Iraq's unlawful invasion and occupation of Kuwait. The Commission will give expedited priority consideration to claims for such losses up to [US]$100,000 per person."

29/ See the First "C" Report, pp. 12-13 and the First "B" Report, pp. 12-13.

30/ See, for example, the First "C" Report, pp. 29-32.

31/ The exchange rates used for 1 August 1990 for the Kuwaiti dinar is the average monthly rate for July 1990 as reported in the United Nations Monthly Bulletin of Statistics, vol. XLV, No. 4, April 1991 (ST/ESA/STAT/SER.1/220).

32/ The exchange rates used for currencies other than the United States dollar or Kuwaiti dinar is the average monthly rate for such currencies as reported in the United Nations Monthly Bulletin of Statistics, vol. XLV No. 4, April 1991 (ST/ESA/STAT/SER.1/220).

33/ Decision 16, paras. 2-3.

34/ The category "C" Panel also found this; see the First "C" Report, pp. 32-33. In the WBC Claim a mid-point date of 15 October 1991 was used. See the "Report and Recommendations made by the Panel of Commissioners appointed to review the Well Blowout Control Claim" (the "'WBC' Claim") (S/AC.26/1996/R.27/Annex). In that claim, however, the losses were quite different from those suffered by individuals in categories "C" and "D," and different criteria therefore applied to the determination of relevant dates.

35/ M. Kazazi, Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals, (The Hague, Kluwer, 1996), p. 116. For a general discussion of this issue see pp. 53-119.

36/ See the First "C" Report, pp. 26-27.

37/ See the First "C" Report, p. 27.

38/ See note 22 above.

39/ See V. S. Mani, International Adjudication: Procedural Aspects, (The Hague, M. Nijhoff, 1980), p. 193. The author also points out: "The principle has been invoked in several international arbitrations. In the Faber case, for instance, Umpire Henry M. Duffield of German-Venezuelan Mixed Claims Commission of 1903 invoked it expressly". In the William A. Parker, claim, the Mexico - U.S.A. General Claims Commission declared in 1926 "for the future guidance of the respective Agents", that "however appropriate may be the technical rules of evidence obtaining in the jurisdiction of either the United States or Mexico as applied to the conduct of trials in their municipal courts, they have no place in regulating the admissibility of and in the weighing of evidence before this international tribunal", United Nations Reports of International Arbitral Awards (UNRIAA), vol. IV, p. 39. This has been followed in the Georges Pinson claim before the French-Mexican Claims Commission of 1924, UNRIAA, vol. V, p. 413; J.H.W. Verzijl, La réparation des dommages causés aux étrangers par des mouvements révolutionnaires: Jurisprudence de la Commission franco-mexicaine des réclamations (1924-1932), (Paris, A. Pedone, 1933), p. 94. See also Lasry case before the United States-Venezuela Mixed Claims Commission of 1903, UNRIAA, vol. X, pp. 147-148.

40/ See paras. 15-17 and 31 above.

41/ Six category "A", four category "B" and five category "C" Panel reports have been submitted to the Governing Council. Two other Panel reports have been issued, in respect of the Egyptian Workers' Claims and the Well Blowout Control Claim.

42/ See in particular Governing Council decision 17 [S/AC.26/Dec.17 (1994)].

43/ Article 17 reads in full:

> "In order to facilitate the work of Commissioners and to ensure uniformity in the treatment of similar claims, the Secretariat will proceed to categorize claims according to, inter alia, the type or size of the claims and the similarity of legal and factual issues."

44/ The First "C" Report details the exodus; see pp. 60-66.

45/ Decision 21 (S/AC.26/Dec.21/1994) and decision 24 (S/AC.26/Dec.24/1994).

46/ See Article 16 Report No. 15 (S/AC.26/1996/R.2).

47/ See chapter IV, section D hereof.

48/ The methodology adopted by the category "C" Panel in respect of C1(Money) can be summarized as follows. Claimants must provide sufficient evidence to demonstrate: 1) the fact of presence or residence in Iraq or Kuwait prior to the invasion; 2) the fact of departure during the period from 2 August 1990 and 2 March 1991 (the "relevant jurisdictional period"); 3) the fact that the losses or the events giving rise to the losses took place during the relevant jurisdictional period; 4) the causal relationship between the loss and the invasion of Kuwait and whether the items claimed fall within the scope of allowable losses; and 5) the value of the loss claimed. See the First "C" Report, pp. 59-81.

49/ See note 6 above.

50/ See paragraph 75.

51/ This is consistent with the decision of the category "C" Panel which found that departure and relocation-related costs resulting from the invasion and occupation of Kuwait and which are shown to be "temporary and extraordinary" expenses (e.g., travel fares, lodging and food while in transit, mileage costs incurred in locating a new residence, short-term residential rentals, short-term furniture rentals and short-term automobile rentals, etc.), may be considered compensable, as opposed to "on-going ordinary living" expenses (e.g., normal telephone charges, dental expenses, school fees, cable television service, etc.) which would not be compensable. See the First "C" Report, pp. 78-79.

52/ See para. 75.

53/ See para. 75.

54/ This is consistent with the view taken in the First "C" Report, p. 77.

55/ See para. 75.

56/ See para. 75.

57/ (E/CN.4/1992/26), para. 79.

58/ Ibid., para. 81.

59/ Ibid., para. 90.

60/ See generally decision 3, decision 7 and decision 8.

61/ Decision 3 (S/AC.26/1991/3)

62/ See in particular pages 82 to 96 of the First "C" Report.

63/ See para. 75.

64/ An example of such relevant external information is the information contained in the claim file of a similarly situated claimant. In the case of one D1(MPA) claim in the first instalment, the evidence contained in the claim file of a similarly situated claimant was drawn to the attention of the Panel and supported the assertions made in the claim being considered.

65/ See para. 75.

66/ The categories identified by the "C" Panel are set out as follows on pages 93 to 95 of the First "C" Report:

> "(a) the claimant or a family member is a national of a country specified in relevant directives or orders issued by the Iraqi Revolutionary Command Council, or is a national of a country known to have been the target of actions by members of the Iraqi armed forces, or officials, employees or agents of the Government of Iraq or its controlled entities, during the period 2 August 1990 to 2 March 1991, in connection with the invasion and occupation of Kuwait;
>
> "(b) the claimant indicates that he or she or a family member was a member of, or was connected, to the Kuwaiti royal family, armed forces, resistance movement, or police force, or that he or she or a family member was a political figure or a high ranking official in the Kuwaiti Government, prior to or during the invasion and occupation of Kuwait, as the case may be;
>
> "(c) the claimant indicates that he or she or a family member was a

medical professional or worker, or a print, television or radio journalist, or an (amateur) radio or computer operator, in the period prior to or during the Iraqi invasion and occupation of Kuwait;

"(d) the claimant indicates that he or she or a family member, or other persons in the same or similar situations, were subjected to, or were threatened with interrogation, arrest, torture, detention, assault, or other forms of injury, by members of the Iraqi armed forces, or officials, employees or agents of the Government of Iraq or its controlled entities, during the period 2 August 1990 to 2 March 1991;

"(e) the claimant indicates that a family member, or other persons in the same or similar situations, were killed, or were under threat of execution, by members of the Iraqi armed forces, or officials, employees or agents of the Government of Iraq or its controlled entities, during the period 2 August 1990 to 2 March 1991;

"(f) the claimant indicates fear caused by specific actions (e.g., execution, injury, assault or detention; or interrogation either at home or at a checkpoint; or the looting and vandalizing of personal property, or damage to real property) on the part of members of the Iraqi armed forces, or officials, employees or agents of the Government of Iraq or its controlled entities, directed towards or taken against the claimant or his or her family, or other persons in the same or similar situations;

"(g) the claimant indicates fear of sexual assault by members of the Iraqi armed forces, or officials, employees or agents of the Government of Iraq or its controlled entities, based on a knowledge of attacks against other persons, in the same or similar situations, by members of the Iraqi armed forces, or officials, employees or agents of the Government of Iraq or its controlled entities, during the period 2 August 1990 to 2 March 1991; and

"(h) the claimant was forced to hide on account of fear caused by actions taken by the Iraqi armed forces, or officials, employees or agents of the Government of Iraq or its controlled entities during the period 2 August 1990 to 12 August 1990 and/or the period from 19 February 1991 to 1 March 1991 (the "critical periods"). According to several reports, conditions of intense hostility were present during the initial stages of Iraq's entry into, and consolidation of its position in, Kuwait. Thus, claimants indicating that they were in hiding during this early period (by most accounts, 2 August 1990 to 12 August 1990), may be presumed to have gone into hiding on account of a manifestly well-founded fear. Similarly, reports indicate that from about 19 February 1991 to 1 March 1991, Iraqi forces embarked on a campaign of arrests and detention as the threat of an attack by the Allied Armed Forces increased. Claimants indicating that they were in hiding during this period, may also be considered to have hidden on account of a manifestly well-founded fear."

The category "C" Panel determined in the case of "forced hiding" that it would rely on the number of days asserted by the claimant on the claim form provided there is no contradictory information available.

67/ See para. 75.

68/ See para. 75.

69/ See First "B" Report, pp. 26, 27, 34 and 36 and First "C" Report, pp. 115-119.

70/ (E/CN.4/1992/26), para. 126.

71/ Ibid., para. 140.

72/ Ibid., para. 189.

73/ Ibid., para. 193.

74/ (S/AC.26/1996/R.2).

75/ The Panel has addressed this issue in chapter V, section D above.

76/ See para. 75.

77/ For purposes of determining the compensation to be paid to claimants, certain individual characteristics pertaining to the deceased should be taken into account. These include the sex and age of the deceased; the nationality group of the deceased; whether or not the deceased was in gainful employment; the normal annual income in the twelve months preceding the event; and whether there are one or more dependent survivors.

78/ The secretariat retained an international firm of actuaries to assist the Panel.

79/ The methodology adopted by the category "C" Panel is set out on pp. 125 - 126 of the First "C" Report as follows: the amount of monthly support that the claimant received from the deceased was assessed in light of the earnings of the deceased and the nature of the family relationship between the deceased and the claimant; the period for future support was projected taking into account the type of family relationship and their ages and normal life expectancy and the normal retirement age that would have applied to the deceased; the period calculated in respect of future support was applied to the support income previously assessed. In order to calculate the present value of the stream of income thus projected, the Panel applied a discount factor to take into account factors such as the time value of money and inflation.

80/ The United States-Germany Mixed Claims Commission awarded compensation where the deceased was a housewife in the following cases: Arthur Courtland Luck; Frances Lapham Field and Terence Joseph Condon. See Marjorie M. Whiteman, Damages in International Law, (United States Government Printing Office, Washington, 1937), vol. I, pp. 693-694.

81/ In this respect the Panel adopted the most complete set of life expectancy tables available for the period nearest to 1990 which are contained in the United Nations Demographic Yearbook, vol. 46, 1994 (ST/ESA/STAT/SER.R/25).

82/ The actuaries considered the normal pensionable age under various social security legislation including that of Kuwait. In accordance with the list of submitting entities represented in the population of all D3 claims submitted to the Commission, the normal pensionable age as at 1990 was 65. In respect of Kuwait however, the normal pensionable age is 55.

83/ In this context, the possible remarriage of the surviving spouse and the fact of the children becoming adult income earners or becoming dependent on others following their marriage are disregarded.

84/ According to the latest statistics available, the following submitting entities have submitted D3 claims: Egypt, Germany, India, Israel, Jordan, Kuwait, Lebanon, Philippines, Sudan, United Kingdom and United States of America.

85/ The three groupings recommended by the actuaries were as follows:
Group "1" - Egypt, Jordan, Kuwait, Lebanon and Sudan;
Group "2" - Israel, Germany, United Kingdom and United States;

Group "3" - India and Philippines.

The above groupings are based on economic factors relevant in determining the life expectancy tables to be applied in respect the deceased, as well as the discount rate for purposes of calculating the present value of the deceased's future stream of income.

86/ The Panel adopted the suggestion put forward by the actuaries that a suitable indicator of safe medium and long-term return is the yield offered by Government treasury bills.

87/ In considering the possible fluctuations in inflation, the actuaries looked at monetary stability which is measured by the International Monetary Fund which compares national currencies to a benchmark represented by the value of a unit of Special Drawing Rights (SDR). As an alternative measure of monetary stability and as a direct indicator of inflation, the actuaries considered the Consumer Price Index for each of the countries in the D3 claims population.

88/ The actuaries used data for Kuwait which compared the Kuwaiti dinar against the SDR (see note 87 above) and showed only minor fluctuations between the period 1966 to 1995. See International Monetary Fund, International Financial Statistics, vol. L, No. 8 (August 1997). In addition, the actuaries looked at inflation in Kuwait over the period 1981 to 1993 and, apart from the period 1981-1984 and 1990-1991, inflation was under 2 per cent, which is not considered "significant" in a modern economy.

89/ The Panel adopted a figure of 3 per cent to account for higher inflation in Group "2" countries and the fact that the average real yields on safe and prudent long-term investment seldom reaches five per cent in those countries.

90/ The actuaries noted in their report that deductions are based on the observation of the composition of average family budgets shown by periodic household surveys conducted in every country. The main items of expenditure are housing, food, clothing and essential services such as health care, transportation and public utilities. A family unit of two allocates the expenses per person almost equally except for housing, hence the 60/40 assumption. Family units of more than two persons represent a different distribution because other needs have to be accommodated, both qualitatively and quantitatively, and therefore the breadwinner's own allocation is lower.

91/ See para. 75.

92/ See note 82.

93/ The Panel adopted the age of 21, guided by the factual circumstances of claimants with first instalment D3 claims which show that they are middle class families where it is normal for children to be in education, training and apprenticeship up to the age of 21. There may be exceptions, however, in societies where girls tend to be married at a relatively young age. In the Velasquez Rodriguez case, the Inter-American Court of Human Rights Judgement of 21 July 1989, Series C: Decisions Final Judgements, No. 7, San Jose, 1990, the court stated that children should be guaranteed the possibility of education, which might extend to the age of twenty-five.

94/ "The Report of the Panel of Experts appointed to assist the United Nations Compensation Commission in matters concerning Compensation for Mental Pain and Anguish", Annex VI of the First "C" Report, p. 259.

95/ See para. 75.

96/ See para. 75.

97/ See note 94.

98/ See chapter V, section F.

99/ Indeed, three specific fact situations and issues in particular are not covered in the D4(MV) first instalment Claims: (a) claims for repair costs; (b) D4(MV) claims in respect of vehicles that were located in Iraq; and (c) claimants who fled Kuwait in their vehicles and may or may not have had to subsequently abandon them.

100/ (S/22409), para. 36.

101/ (S/22535), para. 331.

102/ "Report Regarding Claims for Motor Vehicles," submitted by the Public Authority for Assessment of Compensation of Damages Resulting from Iraqi Aggression, Government of Kuwait, 20 July 1994.

103/ See the PAAC "D" Cover Report, p. 40.

104/ See note 6 above.

105/ See in particular pp. 148-157 of the First "C" Report and paragraphs 40-41 of the "Report and Recommendations made by a Panel of Commissioners concerning the Second Instalment of Individual Claims for Damages up to US$100,000 (Category 'C' Claims)" (S/AC.26/1996/1) (the "Second "C" Report"). The background to the motor vehicle claims is outlined in the First "C" Report.

106/ See also the PAAC "D" Cover Report, pp. 39-40.

107/ See para. 75.

108/ See para. 75.

109/ The methodology used by PAAC to formulate the MVV Table was reviewed carefully by the category "C" Panel and its valuation of motor vehicle claims is based upon the MVV Table. See the First "C" Report, p. 156.

110/ See para. 75.

111/ See para. 75.

112/ See the First "C" Report for further factual background information, pp. 168-171.

113/ Such information is not requested on the "D" claim form.

114/ The professions represented in the D6 first instalment claims include: bankers, engineers, professors, software advisors, accountants, senior managers, technical directors, consultants, pilots, doctors, military personnel and nurses.

115/ See Article 16 Reports Nos. 15 and 16 (S/AC.26/1996/R.2 and S/AC.26/1996/R.16).

116/ "Background Report on Employment Claims (C6)" prepared for the Commission by Alan Gladstone, December 1993 (the "Employment Law Report"). The category "D" Panel found it highly informative in the context of the D6 claims.

117/ See para. 75.

118/ See in particular pp. 168-194 of the First "C" Report. The Second "C" Report focuses more on the statistical sampling methodologies used; see paras. 44-51.

119/ See First "C" Report, pp. 169-173.

120/ See First "C" Report, p. 193.

121/ See Second "C" Report, para. 45.

122/ See Employment Law Report, pp. 6-7.

123/ See Employment Law Report, pp. 15-17.

124/ Commonly known as contracts of indefinite duration.

125/ The following is noted in the Employment Law Report, p. 20: "Although severance allowances - particularly those prescribed by legislation - are neither universal nor necessarily very prevalent outside of the industrialized economies, such allowances are provided for in the laws of Kuwait. Provision is made for a 'terminal indemnity' of 10 days for each year of service up to five years, and for 15 days for each year thereafter..." The awarding of an addition of one (1) to a claimant's multiplier for each complete or partial 3 year period of prior employment is consistent with the foregoing.

126/ See para. 75.

127/ The Panel notes the following as examples of benefits that are quantifiable and have therefore been included in the calculation of monthly income: basic salary, post differential (fixed amount), expatriate premium (fixed amount), hardship premium (fixed amount), professional allowance (fixed amount), occupational allowance, bonus (fixed amount), housing allowance (fixed amount), cost of living allowance (fixed amount), subsidy for living outside company grounds (fixed amount), free pension contribution (fixed amount), travel from work to town allowance (fixed amount), site allowance (fixed amount), daily food allowance (fixed amount), local weekly allowance (fixed amount).

The Panel notes the following as examples of benefits that are not quantifiable and have therefore not been included in the calculation of monthly income: traveling allowance (not fixed), completion bonus (depends on completion of contract), annual leave, sick leave, home leave, performance bonus (not fixed), storage/packing and shipping of personal effects, automobile, expected salary increment, passage home, medical reimbursement (not fixed), one month notice pay, end of contract termination, excess baggage allowance, tuition assistance, redundancy and notice.

128/ See decision 7, para. 11.

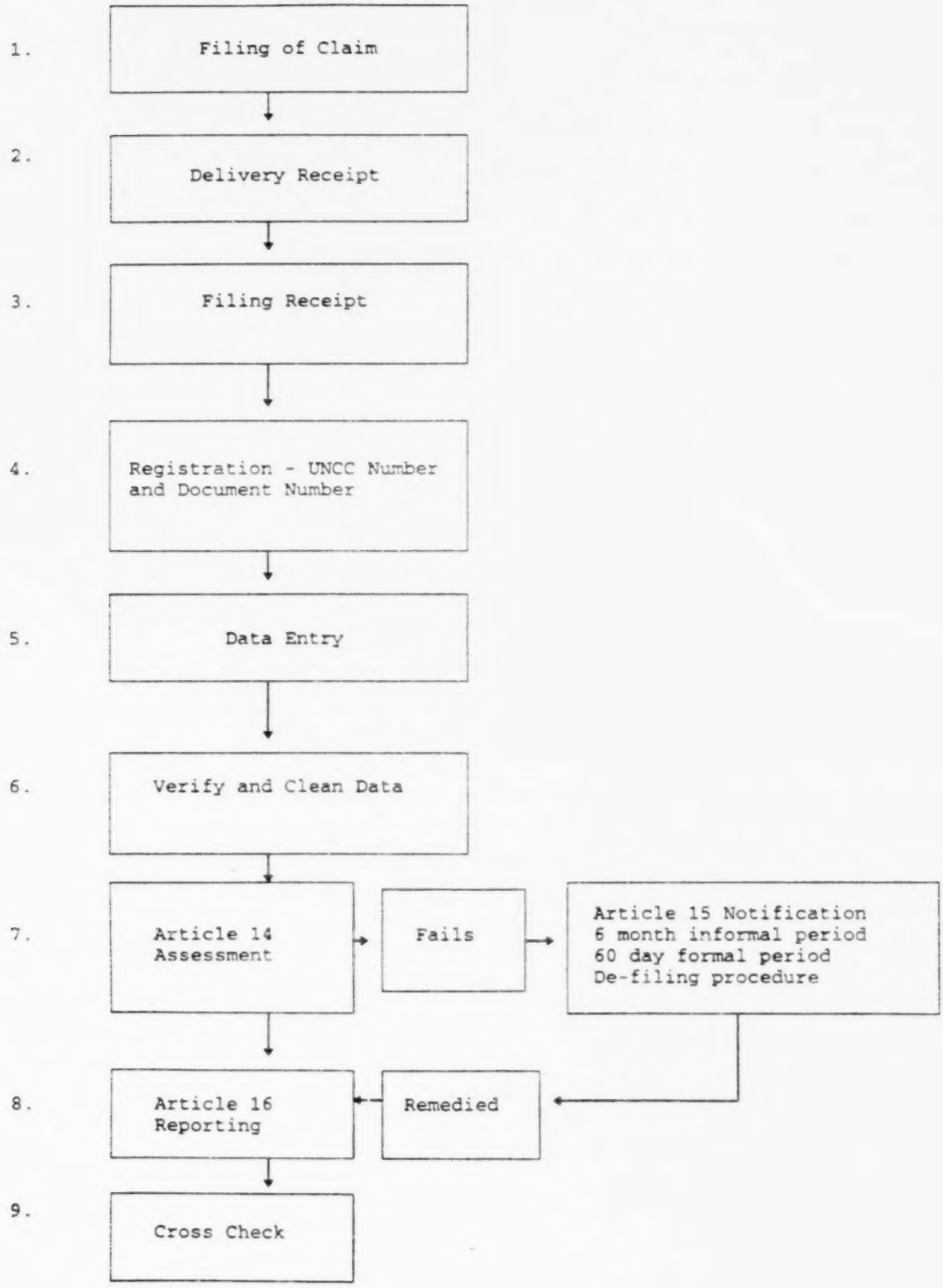
129/ See Article 16 Report Nos. 15, 16 and 17.

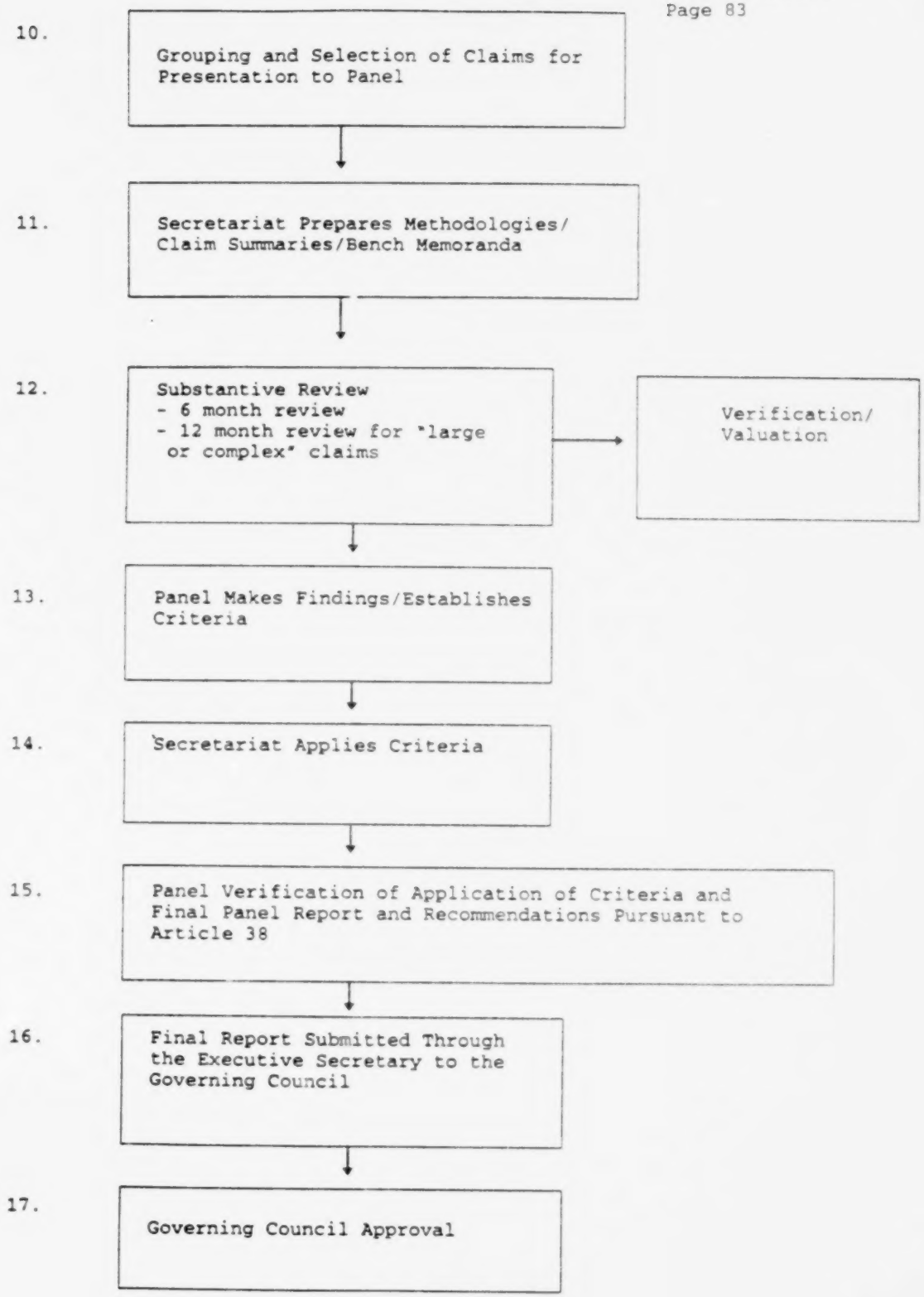
130/ See para. 75.

131/ See Article 16 Report No. 2 (S/AC.26/1993/R.1).

132/ See chapter V, section H.

Annex I
Category 'D' claims
Life cycle of a claim




10.
Grouping and Selection of Claims for Presentation to Panel
11.
Secretariat Prepares Methodologies/ Claim Summaries/Bench Memoranda
12.
Substantive Review
- 6 month review
- 12 month review for "large or complex" claims
Verification/ Valuation
13.
Panel Makes Findings/Establishes Criteria
14.
Secretariat Applies Criteria
15.
Panel Verification of Application of Criteria and Final Panel Report and Recommendations Pursuant to Article 38
16.
Final Report Submitted Through the Executive Secretary to the Governing Council
17.
Governing Council Approval

Annex II

First Instalment Category "D" Claims Recommended for Payment Reported By Country or International Organization

Country or International Organization	Consolidated Claim Number	Number of Claims in the First Instalment	Recommended Amounts (US$)
Australia	AU/00290/03D	2	105,307
Bolivia	BO/00050/01D	1	Deferred*
Brazil	BR/00061/01D	3	0
Canada	CA/00261/01D	4	178,438 One claim deferred*
	CA/00279/02D	6	296,516
France	FR/00241/01D	1	137,854
Germany	DE/00232/01D	1	55,360
Greece	GR/00403/01D	1	Deferred*
India	IN/00203/01D	1	21,630
	IN/00237/01D	3	30,653 One claim deferred*
Ireland	IE/00259/01D	1	7,400
Israel	IE/00287/01D	1	98,429
Italy	IT/00253/01D	1	88,584
Jordan	JO/00763/01D	7	299,324
	JO/01066/07D	1	64,292
	JO/01128/08D	2	43,426
Kuwait	KW/00037/01D	1	To be reported separately**
	KW/00430/01D	12	1,168,772
	KW/00473/05D	1	83,737
	KW/00546/06D	1	Deferred*
Pakistan	PK/00174/01D	1	25,572
Sudan	SD/00293/01D	2	24,913 One claim deferred*
Sweden	SE/00281/01D	1	10,000
UNDP (Washington)	27/00574/01D	1	53,976

United Kingdom	GB/00206/01D	5	187,560
Country or International Organization	Consolidated Claim Number	Number of Claims in the First Instalment	Recommended Amounts (US$)
United States	US/00217/01D	7	2,424,418
Yemen	YE/01216/01D	1	Deferred*
Total Claimed		69	55,591,136
Total Recommended		61	5,406,161
Total Deferred		7	3,008,651
Total Pending		1	31,007,232

* Refer to Procedural Order No. 2.
** Refer to Procedural Order No. 1.

UNITED NATIONS **S**

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UNITED NATIONS
COMPENSATION COMMISSION
GOVERNING COUNCIL

LETTER DATED 19 JANUARY 1998 FROM THE CHAIRMAN OF THE CATEGORY "D" PANEL OF COMMISSIONERS ADDRESSED TO THE DEPUTY EXECUTIVE SECRETARY OF THE UNITED NATIONS COMPENSATION COMMISSION

This refers to your letter reference: UNCC/EXE/512/98 of 8 January 1998 with regard to the consideration by the Governing council at its twenty-sixth session of part one of our Panel's report and recommendations concerning the first instalment of category "D" claims. I am responding to your letter after having discussed the issues considered by the Council with my other colleagues on the Panel.

We much regret that some confusion has been caused by the way in which the word "alone" has been used in paragraph 75 of our report in relation to reliance upon an Acceptable Explanatory Statement.

Before explaining the Panel's intention and understanding as set out in paragraph 75, I would like to take this opportunity to respectfully reassure Members of the governing Council that for the purpose of dealing with claims in category "D", and while considering the claims in the first instalment, the Panel has been acutely conscious of the evidentiary requirement for the category "D" claims established by the Governing Council. This will also be apparent from what has been stated in, for example, paras 7, 67, 69 and 70.

To explain the Panel's intention and understanding with respect to the use of an Acceptable Explanatory Statement, I would like to invite reference to the preceding paragraphs, in particular paragraphs 72 and 74 of the report. As stated in paragraph 72, the Panel concluded that in the difficult circumstances of the invasion and occupation of Kuwait "many claimants cannot, and cannot be expected to, document all aspects of a claim". It is then stated that the level of proof the Panel has considered appropriate is close to what has been called "balance of probability" as

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distinguished from the concept of "beyond reasonable doubt" required in some jurisdictions to prove guilt in a criminal trial. Therefore, where a claimant was unable to document all aspects of a claim (but only some of them), the Panel concluded, as stated in para 74, that "in respect of certain loss types, significant weight must be given to, and reliance can be placed upon, a clear explanatory statement in support of the particulars in the "D" claim form". As will be apparent from what is stated later in the report (e.g. paras 107, 160, 166) the kinds of loss types the Panel particularly had in mind were departure claims, being taken as a hostage, forced hiding, death claims and resulting Mental Pain and Anguish (MPA) or loss of support. In each of such cases, an Acceptable Explanatory Statement is only intended to be relied upon as supplementary evidence provided other surrounding circumstances justify doing so. In other words, the intention has been that where there is a gap in the claimant providing complete documentary evidence to support a particular kind of loss type, the Acceptable Explanatory Statement, given the surrounding circumstances, might be relied upon to fill such a gap. The intention has not been that the Acceptable Explanatory Statement could be relied upon where there was no other evidence at all.

As will be seen, even in the definition of an Acceptable Explanatory Statement in paragraph 75, the requirement is for an explanation for the absence of "additional documentary evidence". When making a reservation regarding use of an Acceptable Explanatory Statement in respect of future larger and more complex loss types, it was the Panel's intention to indicate that in such future cases even an Acceptable Explanatory Statement may not be sufficient to explain the absence of additional documentary evidence which the Panel might consider absolutely essential in a particular set of circumstances. In other words, in the case of future larger and more complex loss types, even an Acceptable Explanatory Statement may not be regarded as sufficient to cover the gap in the documentary evidence.

I would also like to reaffirm the assurance already provided by you to the Governing Council that no claim in the first instalment has been approved only on the basis of an Acceptable Explanatory Statement. In relation to the eight claims where an Acceptable Explanatory Statement was taken into consideration, four were MPA claims related to departure, being taken as hostage or death claims, one was a D1 (Money) claim related to departure expenses, there were two support claims out of D3 death cases and one a D6 (loss of income) claim. In each of these cases, there was other documentary evidence and an Acceptable Explanatory Statement was only referred to by way of supplementary evidence. In fact, in regard to the MPA claims relating to hostage taking and forced hiding of one Irish claimant and one Swedish claimant, some reliance

was also placed on one of the background reports indicating that nationals of OECD countries were held as hostages and some used as "human shields" (paragraph 143).

I would therefore respectfully submit for the Governing Council's consideration, that there should be no apprehension that an Acceptable Explanatory Statement has been or will be used to recommend payment of a claim where there is no other documentary evidence.

[Signed] R.K.P. Shankardass
Chairman
Category "D" Claims
Panel of Commissioners